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Office Supreme Court, U.S.
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In the Supreme Court of the United States

No. — 338

QUICKIE TRANSPORT COMPANY

Appellant

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees

AND

INDIANHEAD TRUCK LINE, INC., AND SCHIRMER TRANSPORTATION COMPANY

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, FOURTH DIVISION

STATEMENT AS TO JURISDICTION

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OPINION AND JUDGMENT BELOW

The opinion of the three judge district court, filed January 30, 1959, is reported in — Fed. Supp. —. The opinion is included here as Appendix D.

The decision of the Interstate Commerce Commission here involved has not been printed in the reported decisions, but appears in the Appendix.

GROUNDS OF JURISDICTION

Plaintiff appeals under *U. S. C.*, Sec. 1253 and Sec. 2101 from the judgment of a three-judge court denying relief and dismissing the complaint in an action under *49 U. S. C.*, Sec. 305 (g) by a motor carrier to set aside an order of the Interstate Commerce Commission that denied its application for a certificate of public convenience and necessity to exceed its interstate operations.

The judgment appealed was dated January 30, 1959; it was entered February 2, 1959. The notice of appeal was filed on March 24, 1959, in the United States District Court, District of Minnesota, Fourth Division. On May 4, 1959, an order was made and filed in said court enlarging the time for docketing the appeal to 60 days from May 23, 1959, and by a like order made and filed July 13, 1959, the time was further extended 30 days.

28 U. S. C., Sec. 1253 confers jurisdiction of the appeal.

A number of cases sustain jurisdiction, among them, *Schaffer Transportation Company v. U. S.*, 355 U. S. 83, 78 S. Ct. 173, 2 L. Ed. 2d 117; *United States et al. v. Pierce Auto Freight Lines, Inc. et al.*, 327 U. S. 515, 66 S. Ct. 687, 90 L. Ed. 821; *Interstate Commerce Commission, et al. v. Parker, et al.*, 326 U. S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051.

QUESTIONS PRESENTED BY APPEAL

In proceedings under the Interstate Commerce Act—

1. Can the Interstate Commerce Commission after a consolidated hearing on the applications of five motor carriers, equally competent, for certificate of public convenience and necessity to extend interstate operations from a

new point of origin give "special consideration" to four of them, because they are authorized to operate from an existing point of origin to portions of the area to be served from the new origin, so that the fact of holding that authority is a pre-requisite to granting authority from the new origin and the effect is to exclude one of the five applicants.

2. Further, as here, can this kind of a condition precedent be imposed after hearing solely because to some undetermined extent traffic from the new origin will supplant traffic presently moving from the other origin notwithstanding that the evidence does not show to what extent the existing origin will be affected by the new origin, or that any of the four favored carriers would be adversely affected by grant of authority to the fifth, or that the traffic at the new origin will not reasonably require five as well as four carriers.

3. Under such circumstances, can this kind of a condition be invoked after a consolidated hearing where all five applicants relied on the same evidence, which was not less favorable for one than for another, to establish public convenience and necessity for the service of each with the effect that there is retroactively and administratively imposed on one applicant a different and more onerous measure of proof than on others, and while the burden of proof of each of four applicants is carried with a mere showing of a need for tank truck service and authority from another origin to a portion of the involved destination area, the proof required of the fifth is not only a need for its service but in addition that the public convenience and necessity required not less than all five carriers.

4. Under the circumstances described above, can the Interstate Commerce Commission administratively decide

that proof of present or future public convenience and necessity requires proof of permanent interstate operating authority from an existing origin, which to some extent will be affected by traffic from the new point of origin to a portion of the area to be served from the new origin.

STATEMENT OF THE CASE

When the applications here involved were filed Great Northern Oil Company was building an oil refinery at Pine Bend in Minnesota. The plant was designed for output of 25,000 barrels a day, with an initial production of 17,500 barrels a day. Pine Bend is near but outside the Minneapolis-St. Paul commercial zone. While some of the production would be transported by rail and pipeline, need to haul some by tank truck inspired filing applications to the Interstate Commerce Commission by motor carriers for authority. Plaintiff was one of the seven applicants.[1]

The destination area sought by the applicants varied. Four asked for authority to haul to points in five states (Iowa, North Dakota, South Dakota, Wisconsin and in the Upper Peninsula) and these were referred for hearing to an examiner; three asked for points in fewer states and these were assigned to a joint board. The applications, however, were consolidated for hearing with one record upon which the examiner and joint board made a single report. Evidence given gave substantial support to only

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[1] The applications, docket numbers and authority sought are set out in the report and orders in Appendix "A". For convenience the applicants are referred to here, as they have been in the prior proceedings, as Indianhead, Quickie, Ruan, Schirmer, and Terminal. In the narrative only these carriers are mentioned.

five of the carriers and, as to them, for authority only to points in Wisconsin and the Upper Peninsula.[2]

The area of destination authority in Wisconsin and the Upper Peninsula sought also differed. Schirmer prayed for radial authority to points in Wisconsin within 150 miles of St. Paul and Nekoosa and Wisconsin Rapids. Terminal applied for 22 counties in Western Wisconsin and points in five other counties. Ruan's request included the same counties as Terminal's with three exceptions. Indianhead's application was for points in Wisconsin and the Upper Peninsula with 275 miles of St. Paul except Houghton and Keweenaw Counties.[3] Plaintiff asked for authority to points in Wisconsin and the Upper Peninsula. According to the applications, roughly speaking, Schirmer, Terminal and Ruan would serve the same general area, Indianhead and plaintiff would serve that area and the additional area lying within 275 miles of St. Paul and plaintiff alone would serve points in Wisconsin and the Upper Peninsula beyond that 275 mile radius. The destination area applied for coincided with the existing authority held respectively by Schirmer, Terminal, Ruan and Indianhead from the Minneapolis-St. Paul commercial zone origin to Wisconsin and the upper Peninsula. Plaintiff held no interstate authority from that origin.

The examiner and joint board recommended that each of these carriers be given the destination area sought by it.[4]

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[2] Brevity as well as understanding probably will be served in this narrative by treating the case as involving these carriers and this destination area only. Plaintiff and the other applicants did not object to limitation of the area and only plaintiff of unsuccessful applicants has appealed.

[3] Appendix "A".

[4] Appendix "B".

Only Indianhead excepted to the order recommended by the examiner on plaintiff's application, though Schirmer in a "Reply to all Exceptions" rather perfunctorily "adopted" Indianhead's position. The decision of the Commission was by a report[5] in which it found among other things:

1. All applicants are fit and able financially and otherwise to conduct the proposed operations (Sheet 9).

2. There is a strong, well established need for the services proposed for the Pine Bend origin (Sheet 33).

3. Shipments from Pine Bend will move principally to points in Wisconsin and the Upper Peninsula of Michigan and will supplant traffic now moving from principal sources of supply at Minneapolis and St. Paul (Sheet 34).

4. Several applicants are authorized to serve a portion of the destination territory involved in Wisconsin and Michigan as well as the origin points from which the traffic is presently moving. Schirmer, Terminal Transport, Ruan, and Indianhead operate from Minneapolis and St. Paul and Quickie under temporary authority from Wrenshall to points in Wisconsin in and/or Michigan (Sheets 34-35).[6]

5. Present and future public convenience and necessity require operation in the proposed service by Indianhead, Ruan, Schirmer and Terminal.

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[5] Appendix "B" References immediately following are to sheets in this report.

[6] This temporary authority was made permanent by the Commission on March 31, 1958, in M. C. 112223 Sub. 6, "From Wrenshall, Minnesota, to points in Wisconsin and points in the upper peninsula of Michigan * * *." Thus plaintiff whose application alone described all the affected destination area, became the only applicant whose permanent authority encompassed it.

6. Quickie has failed to establish that present and future public convenience and necessity for its proposed operation, and its application should be denied (Sheet 42).

This was not a unanimous report. Two commissioners dissented in part: They "would grant authority to Quickie to transport * * * from Great Northern Oil Company's refinery at or near Pine Bend, Minnesota, and points within 2 miles of Pine Bend, to points in Wisconsin and the Upper Peninsula of Michigan."[7]

Plaintiff timely moved for reconsideration of the Commission report and for the authority it sought.[8] The assigned error in the petition was the conclusion that was the Commission's sole explanation for giving four applicants favorable consideration and denying plaintiff, viz.:

> "Considering the evidence, it is concluded that Schirmer, Terminal Transport, Ruan, and Indianhead should be authorized to handle the described traffic from the site of the Pine Bend refinery and points within two miles of Pine Bend to the destination areas hereinafter designated and that such services will be sufficient to handle shippers motor carrier traffic from the described origin territory.
>
> "We feel that special consideration should be accorded to those carriers presently serving the origins to be affected by the new source of supply at Pine Bend and which already have permanent authority to serve a portion of the destination areas involved."[9]

and the grounds for the assignment of error were:

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[7] Appendix "B" sheet 43. Commissioners Tuggle and Mitchell dissenting. Commissioners Minor and McPherson did not participate.

[8] Appendix "C".

[9] Appendix "B", sheets 34-35.

1. The distinction between Schirmer, Terminal, Ruan and Indianhead on the one hand and Quickie on the other in the grants of authority from Pine Bend to Wisconsin and the Upper Peninsula is wholly without evidentiary support and hence contrary to law.

2. If the consolidated record of these proceedings shows public convenience and necessity calls for a grant of authority to any other applicant from Pine Bend, as a matter of law it also requires a grant of authority to Quickie.

3. On this record public convenience and necessity is shown to require the services of petitioner to the extent recommended by the examiner.

The petition was denied and plaintiff brought this action. Schirmer and Indianhead intervened.

The evidence introduced in court consisted of the entire record before the Commission. A brief description of the proceedings before the examiner and of the position of the parties there is therefore important.

While the transcript is long, most of the testimony related to matters being considered in the consolidated hearing which were not relevant to plaintiff's application or the other applications involved here. Virtually all of evidence of public convenience and necessity on these applications is in 68 pages of the transcript (pp. 269-337).[10] All five applicants relied on the same testimony and it applied alike to them except as the shippers expressed a preference for one or the other carriers' services. There was practically no cross examination, none of the testimony was controverted by any of the five carriers, and it was simply stated. There was no real attempt by any applicant to discredit the estimate of a witness of his motor carrier needs

[10] A page reference unless otherwise shown is to the stenographer's minutes of the hearing which is in evidence.

either in respect to number of carriers or extent of destination area.[11]

Each of the applicants noted an appearance as a protestant to the applications of the others.[12] Early in the hearing when existing interstate authority was known the examiner asked all applicants if there was any contention that the "follow-the-traffic" principle set out in *South & Soloman Trucking Company Extension-Camden, N. J.*, 61 M. C. C. 748, was applicable. None was asserted.[13] Thus all applicants had the same standing and assumed the same posture. Upon each, for all that appeared, there was the same burden of proof, i.e., the usual one where the concern is a new origin and there is no existing motor carrier service.

Three shippers gave evidence of need: Great Northern Oil Company by Mr. Robert S. Little, Western Oil and Fuel Company by Mr. George R. Watson, and Socony Vacuum Oil Company by Mr. Harold B. Buerosse and Mr. M. E. Erickson. Their testimony is summarized in the Commission's report.[14] Of particular importance in this appeal is their testimony upon which the Commission based its conclusion that this new source of supply would sup-

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[11] Indeed, there was little apparent attempt to discredit it even by rail protestants who were active participants.

[12] At the outset of the hearing the other four carriers stated a two-fold ground of opposition to plaintiff, viz.: that its application incroached on the Minneapolis-St. Paul commercial zone and that no "new authority should be needed from Pine Bend." These grounds were eliminated by an amendment of the application (pp. 14, 15, 17 and 208) and evidence making it clear the refinery would not be in the zone. Exparte Mc-37, Exhibit 1, Schirmer, p. 20 and Exhibit 27, Quickie, p. 165.

[13] Appendix "A" sheet 14.

[14] Appendix "B" sheets 23-27.

plant gallonage previously taken from Minneapolis-St. Paul sources for shipment to Wisconsin and the Upper Peninsula.[15] Mr. Little, whose company was building the plant and planned to transport either by distribution or sale to other companies, all the production not taken by Socony and Western, said only that Wisconsin "is primarily where our movement by truck would move in interstate commerce" (p. 273). He was at pains to point out the possibility of a pipeline from the plant to serve Minnesota and North Dakota points (p. 222), that location of the refinery "should open the markets to a degree in Wisconsin over that being presently served on the rate structure from the Twin Cities" (p. 272), and he hopes "the mileage into Wisconsin that can be presently served from the Twin Cities will be greater by 15 to 20 miles as a minimum" (p. 274). He said, "My idea for the new business in that respect is that there will be some supplanting of other terminal shipment. But it will also, we think, take care of some business that might have been shipped in from Milwaukee acrossstate to Wisconsin or some other origin in the state" (p. 276). The rest of his testimony showed the same uncertainty about supplanting existing Twin City sources. On the other hand he disclosed a need for motor carrier service to Wisconsin in some degree, and he adequately explained his support of all seven applicants (p. 275).

Mr. Watson showed Western Oil and Fuel Company, a distributor of petroleum products from a number of places which planned to take 5000 barrels a day of the Pine Bend product, needed motor carrier transportation from that source to points in Wisconsin and the Upper Peninsula (p. 300). "To a certain extent this part of the Great North-

[15] Appendix "B" sheets 34. For Socony's share, sheet 33. As to Western's share ("* * * and to a limited extent from Wrenshall * * *") sheet 34.

ern Oil Company's products will supplant materials that Western Oil and Fuel Company is shipping from other origins particularly from its own terminal in Minneapolis and from Great Lakes Pipeline Terminal at New Brighton" (p. 298).[16] He supported all applicants but particularly wanted the services of Quickie and Schirmer.

Socony-Vacuum Oil Company contracted for about 75% of the refinery product. Mr. Beurosse spoke for it. He "primarily" supported Ruan, Terminal, Schirmer and Indianhead into Wisconsin, but also wanted two carriers to the Upper Peninsula (pp. 318-319)[17] He did not say to what extent the gallonage his company contemplated taking would supplant gallonage presently obtained in Minneapolis-St. Paul. When asked "Would the Pine Bend refinery take away product from other origins that was previously going into Wisconsin and the Upper Peninsula of Michigan?" he answered, "Until we know the complete rate structure as well as basic cost of material it would be impossible to determine that, but I feel certain it will be an increased zone" (p. 321). He did not recall that the company used Indianhead for shipments from the Twin Cities to the Upper Peninsula (p. 321).

Mr. Erickson, whose territory included only seven counties in Wisconsin, also speaking for Socony, made it clear he did not wish to create the impression "that we are going to move all products direct from Pine Bend to the seven

[16] At p. 301 this statement in answer to a question of the examiner: "My testimony on that is, the material we get out of the Great Western Oil Company will to a large extent supplant certain products we are now shipping out of the Great Lakes Pipeline Company or New Brighton and products that we are shipping out, or have been shipping out of are our own terminal at Minneapolis."

[17] Only plaintiff and Indianhead applied for the Upper Peninsula, and only plaintiff for all of it.

counties." Rather he said, "There are certain destination points in those counties which appear at the present time to be more favorable as a direct movement from Pine Bend than it would by taking in the same product out of St. Paul barge terminal provided we pipe it to that point" (p. 331). He disclosed tentative plans for a pipeline from Pine Bend to the St. Paul barge terminal (p. 325).[18]

This description of the testimony makes it clear that the finding that "shipments to Wisconsin and the Upper Peninsula will supplant traffic at Minneapolis and St. Paul" is wholly unwarranted by the evidence if that means supplant in equal amount or substantial amount. That is important in the case because of the Commission's conclusion that special consideration should be accorded those carriers serving origins affected. There is nothing in evidence from which the Commission could determine how much those origins will be affected. Unless they would be substantially affected no reason appears why those carriers should be favored over plaintiff. This uncertainty about how much business from the Twin Cities would be affected by a probable shifting of supply undoubtedly explains the refusal of any applicant to assert reliance on a right to "follow-the-traffic." There was no evidence from which the Commission might have found shifting of supply to Pine Bend would have a substantial effect upon any carrier's revenue and its ability adequately to serve the public in the performance of its over-all operation.[19] It did not, of

[18] These quotations are believed to fairly show the meaning of the witnesses' testimony about the degree of supplanting of Twin City sources each expected from Pine Bend. They do not purport to include all that these witnesses said, of course.

[19] A typical statement of this principle is *Howard R. Williams, Inc. Extension MC. 573* (sub. No. 24). *Smith & Solomon Trucking Company Extension 61 M. C. C. 745, 9 F. C. C. 706*, seems to be accepted as crystallization of the principle.

course, and no attempt was made by any applicant to prove that.

There was no finding by the Commission that four carriers would be required to carry the traffic and no evidence from which such finding could have been made. The difference in administrative treatment of plaintiff's application and the treatment accorded the applications of the others is explained only by the "special consideration" rule adopted in the disposition of this case. There was no intimation anywhere until after the hearing, the favorable examiner's report, and the exceptions that lack of the authority from another origin to a part of the involved destination area would disqualify applicant. These considerations were pointed out to the Commission in plaintiff's petition for reconsideration.[20] They were also pointed out to the court.

The court thought it was apparent that the grounds of the Commission's decision to deny plaintiff's application and give special consideration to the carriers presently serving the area generally was that the "new business originating at Pine Bend was only supplanting part of that formerly originating within the Twin Cities commercial zone" and quoted for support the Commission's finding, "It is evident that shipments for Pine Bend will move principally to points in Wisconsin and the Upper Peninsula of Michigan and will supplant traffic now moving from principal sources of supply at Minneapolis and St. Paul." From these "unchallenged facts" the court concluded that the Commission acted reasonably. "In effect this is merely a geographical enlargement of the Twin Cities shipping zone to serve approximately the same amount of traffic."

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[20] Appendix "C".

But (a) the Commission's conclusion is not an "unchallenged fact," but is challenged as a material finding not warranted by the evidence, (b) the statement of the Court that the new business at Pine Bend was only supplanting *part* of that formerly originating within the Twin Cities zone is not the legal or factual equivalent of the Commission's statement but rather quite different in meaning, (c) if the effect of the Commission's action was a geographical enlargement of the Twin Cities commercial zone, it was doing something indirectly in this proceeding which it could not do directly,[21] and (d) there is nothing in the record upon which the court could say "to serve approximately the same amount of traffic," for that is nowhere even suggested.

Next the court referred to plaintiff's contention that there was no evidence that the traffic would not support five as well as four carriers and answered by saying that this was part of plaintiff's burden of proof. The answer begs the question in issue. The right of the Commission retroactively to declare after hearing a condition which disqualified plaintiff is now, and before the trial court was, questioned. If there was burden of proof on plaintiff to show the traffic required five carriers it was a burden imposed retroactively on plaintiff alone by special consideration given to other applicants because of their authority to operate from the Twin Cities. Plaintiff's evidence, which the Commission said failed to prove public convenience

[21] Changing the boundaries of a commercial zone is an exercise of power under Section 203 (b) (8) of the Interstate Commerce Act (49 U. S. C. Sec. 303 (b) (d), it is rule-making and subject to the procedural requirements of the Administrative Procedure Act. *St. Louis-East St. Louis Commercial Zone No. M. C. C-1 61 M. C. C. 489, 9 F. C. C. 32, 729.01.* Significant, if the court's interpretation is meaningful, is that a rule has future effect, not retroactive. Section 2 Administrative Procedure Act. 5 U. S. C. Sec. 1001.

and necessity for his service, was the same evidence which proved public convenience and necessity for the others.

At the hearing all applicants were on the same level. The idea that anyone had a right to follow shifting traffic to the new origin was in effect disclaimed. Each believed, and proceeded upon the belief, that his burden of proof was the same as the others, to prove besides fitness a need for his service. By the Commission ex post facto rule of "special consideration" the measure of proof applicable to the others was simply to show a pre-existing authority from another origin, but the measure applied to plaintiff was to show not only a demand for his service but affirmatively that there was more traffic than could be handled by the favored four carriers. In other words plaintiff's position became instead of one of five applicants seeking authority from a new origin to one of an applicant seeking authority from an origin already served by four carriers which required him to show inadequacy of service, a burden palpably impossible to carry where, as here, the origin had not yet started business. The effect of the decision to give special consideration to the others was arbitrarily to exclude plaintiff.

As stated above there was no finding, and no evidence from which a finding could be made, that four carriers and not five would be required to haul the traffic. This cannot be inferred, either, from the fact there is an ultimate finding of public convenience and necessity as to four for that ultimate finding is based wholly on the announced principle that those with the existing authority will be the most favored. This is clear from the fact, noted by the Commission,[22] that because one of the favored carriers

[22] Appendix "B", sheet 40.

was acquired by another one of them during the pendency of the proceedings, the authority the former would have obtained would be given to the latter, reducing the number of carriers public convenience and necessity required to three. If there actually had been a finding of the need for four carriers, plaintiff should, when that fact was noted, been given authority. Had plaintiff's temporary authority been made permanent from Wrenshall, as it later was, it would have been included, too, presumably. Actually the Commission merely observed that the services of the four "will be sufficient to handle shippers motor carrier traffic from the described origin territory," and did not find that on the evidence. The classification upon which the plaintiff was excluded was entirely artificial in relation to the transportation need disclosed in the record.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions here presented are substantial and novel and merit plenary examination.

Appellant believes these questions have not been decided by this Court. It has found no case where the Commission has assumed its discretionary responsibility to determine public convenience and necessity can be fulfilled by the administrative expedient of excluding those who do not come within an arbitrarily defined class of applicants who should have special consideration. Heretofore it has been assumed that determination of public convenience and necessity for a carrier's service should be based on a showing of need.

The underlying factual situation is merely typical. Pipeline, barge and rail terminals and new refineries are constantly being established to meet an increasing demand for petroleum products and to reduce distribution costs. It

would be exceptional if a new terminal did not need tank truck service in interstate commerce. Each new terminal, of necessity, is planned to service an area already served from other origins, and to some extent there must be a supplanting of the supply theretofore hauled from another origin. When a number of carriers apply for authority it is customary and proper to consolidate the proceedings. This was the situation there.

The Commission's decision was in effect a classification of applicants for preference. The decision raises an issue which is basic and goes to the scope of the Commission's discretionary right. Where the evidence at a consolidated hearing discloses no facts relevant to the inquiry from which the Commission can differentiate between applicants for a certificate of public convenience and necessity, and indeed none from which the Commission can reasonably decide how many should be certified, can the Commission meet its responsibility by defining in its decision after the hearing is completed, a class of applicants who should be given preference and thereby exclude those not within the class. The question becomes particularly acute where, as here, the classification had no relevance to public convenience and necessity as it was shown to exist by the evidence.

If it can do so, then here a rule of law has been established which should be applicable to give preference in future hearings where the situation is as typical as here. If it is not a rule of law, then plaintiff has been discriminated against unfairly.

The discrimination becomes evident in another way also by changing the burden of proof among different applicants. Here the Commission's action retroactively imposed a burden of proof on plaintiff which was not imposed on the others, for by it the measure of proof was different for it than others.

The court should note probable jurisdiction.

Dated August 17, 1959.

Respectfully submitted,

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Attorney for Appellant

APPENDIX A

Interstate Commerce Commission

Served May 9, 1955

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 10 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-103654 (Sub-No. 30)[1]

Schirmer Transportation Company, Inc.

Extension—Pine Bend, Minn.

Submitted ———— Decided ————

1. In No. MC-103654 (Sub-No. 30), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in a described area in Wisconsin and to Nekoosa and Wisconsin Rapids, Wis.

No. MC-103654 (Sub-No. 30) Sheet 2

2. In No. MC-103947 (Sub-No. 25), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in specified counties and areas in Wisconsin.

3. In No. MC-107496 (Sub-No. 42), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes,

[1] This report also embraces Nos. MC-103947 (Sub-No. 25), Terminal Transport Co. Extension—Pine Bend, Minn.; MC-107496 (Sub-No. 42), Ruan Transport Corporation Extension—Pine Bend, Minn.; MC-108449 (Sub-No. 28), Indianhead Truck Line, Inc., Extension—Pine Bend, Minn.; MC-112223 (Sub-No. 19), Quickie Transport Company Extension—Pine Bend, Minn.; MC-28132 (Sub-No. 30), Hvidsten Transport, Inc., Extension—Dakota County, Minn.; MC-101075 (Sub-No. 31), Transport, Inc., Extension—Pine Bend, Minn.; and MC-113410 (Sub-No. 1), Dahlen Transport, Inc., Extension—North Dakota.

of petroleum and petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in specified counties in Wisconsin.

4. In No. MC-108449 (Sub-No. 28), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St. Paul, except those in Houghton and Keweenaw Counties, Mich.

5. In No. MC-112223 (Sub-No. 19), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum and petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in Wisconsin and the Upper Peninsula of Michigan.

6. In No. MC-113410 (Sub-No. 1), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Richards Oil Company's blending plant at Savage, Minn., to points in North Dakota and Wisconsin.

7. Issuance of certificates in above proceedings approved upon compliance by applicants with certain conditions and applications in other respects denied.

8. In Nos. MC-28132 (Sub-No. 30) and MC-101075 (Sub.-No. 31), public convenience and necessity found not

to require operation by applicants as common carriers by motor vehicle, over irregular routes, of petroleum and petroleum products from specified points and areas in Minnesota to points in Wisconsin, Iowa, North Dakota, South Dakota and the Upper Peninsula of Michigan. Applications denied.

Donald A. Morken for applicants in Nos. MC-103654 (Sub-No. 30) and MC-101075 (Sub-No. 31) and for protestants in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1).

No. MC-103654 (Sub-No. 30) Sheet 3

Leonard E. Lindquist for applicant in No. MC-103947 (Sub-No. 25), and for intervener in opposition in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1), and for intervener as its interests may appear in Nos. MC-103654 (Sub-No. 31), and MC-101075 (Sub-No. 31).

Rex H. Fowler and *Henry Fabritz* for applicant in No. MC-107496 (Sub-No. 42), and for intervener in opposition in Nos. MC-112223 (Sub-No. 19), MC-113410 (Sub-No. 1), MC-108449 (Sub-No. 28), and MC-28132 (Sub-No. 30).

Glenn W. Stephens for applicant in No. MC-108449 (Sub-No. 28), and for intervener in opposition in Nos. MC-112223 (Sub-No. 19), MC-101075 (Sub-No. 31), MC-113410 (Sub-No. 1), and MC-28132 (Sub-No. 30).

Gordon Rosenmeier for applicant in No. MC-112223 (Sub-No. 19), and for protestant in all other proceedings.

Alan Foss for applicant in No. MC-28132 (Sub-No. 30), and for intervener in opposition in all other proceedings.

Thomas W. Walsh and *Lawrence C. Merthan* for appli-

cant in No. MC-113410 (Sub-No. 1), and for protestant in Nos. MC-103654 (Sub-No. 30), MC-107496 (Sub-No. 42), MC-103947 (Sub-No. 25), MC-108449 (Sub-No. 28), and MC-112223 (Sub-No. 19).

George R. Watson and *Robert G. Little* for interveners in support of applicants in all proceedings.

R. W. Cronan, Stuart W. Rider, Frank S. Farrell and *Charles H. Clay* for interveners in opposition in all proceedings.

Report and Orders

Recommended by Joint Board No. 142 Composed of William P. O'Donnell of Minnesota and Calmer Browy of Wisconsin, and by Allan F. Borroughs, Examiner

These cases are closely related in subject matter and participants and will be disposed of here in a single report.

By application in No. MC-103654 (Sub-No. 30), filed April 6, 1954, as amended, Schirmer Transportation Company, Inc., of St. Paul, Minn., hereinafter called Schirmer, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend, Minn., and points within 1 mile thereof to points in Wisconsin within 150 miles of St. Paul, Minn., and to Nekoosa and Wisconsin Rapids, Wis., over irregular routes.

By application in No. MC-103947 (Sub-No. 25), filed April 7, 1954, as amended, Terminal Transport Company, a corporation, of St. Paul, hereinafter called Terminal Transport, seeks a certificate authorizing the transportation of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new re-

finery at Pine Bend and points within 1 mile thereof to points in Polk, Barron, Chippewa, Clark, Jackson, Monroe, Vernon, LaCrosse, Trempealeau, Buffalo, Eau Claire, Dunn, Pierce, St. Croix, Pepin, Crawford, Juneau, Marathon, Richland, Sauk, Taylor

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and Wood Counties, Wis., and to points in Douglas, Burnett, Washburn, Sawyer and Rusk Counties, Wis., within 100 miles of St. Paul, over irregular routes.

By application in No. MC-107496 (Sub-No. 42), filed April 5, 1954, as amended, Ruan Transport Corporation of Des Moines, Iowa, hereinafter called Ruan, seeks a certificate authorizing the transportation of petroleum and petroleum products including chemicals derived from petroleum and compounded oils having a petroleum base, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend and points within 1 mile thereof to points in Barron, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Jackson, Eau Claire, LaCrosse, Marathon, Monroe, Pepin, Pierce, Polk, Rusk, St. Croix, Taylor, Trempealeau, Washburn, and Wood Counties, Wis., over irregular routes.

By application in No. MC-108449 (Sub-No. 28), filed April 12, 1954, Indianhead Truck Line, Inc., of St. Paul, hereinafter called Indianhead, seeks a certificate authorizing the transportation of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend and points within 1 mile thereof to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St. Paul except those in Houghton and Keweenaw Counties, Mich., points in Iowa and South Dakota, and Wahpeton, Fargo, Grand

Forks, and Jamestown, N. Dak., and points within 10 miles of each, over irregular routes.

By application in No. MC-112223 (Sub-No. 19), filed May 3, 1954, as amended, Quickie Transport Company, a corporation, of Minneapolis, Minn., hereinafter called Quickie, seeks a certificate authorizing the transportation of petroleum and petroleum products including chemicals derived from petroleum, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend and points within 10 miles thereof except the United States Air Force storage installation (near Hastings, Minn.) and points within the Minneapolis-St. Paul, Minn., commercial zone to points in Iowa, North Dakota, South Dakota, Wisconsin and the Upper Peninsula of Michigan, over irregular routes.

By application in No. MC-28132 (Sub-No. 30), filed August 2, 1954, as amended, Hvidsten Transport, Inc., of Fargo, N. Dak., hereinafter called Hvidsten, seeks a certificate authorizing the transportation of petroleum and petroleum products, in bulk, in tank vehicles, from points in Dakota County, Minn., and points within 10 miles thereof except those in the Minneapolis-St. Paul commercial zone not otherwise authorized and except the site of the United States Air Force storage installation to points in Iowa, South Dakota, Wisconsin and the Upper Peninsula of Michigan, over irregular routes.

By application in No. MC-101075 (Sub-No. 31), filed August 9, 1954, as amended, Transport, Inc., of Moorhead, Minn., seeks a certificate authorizing the transportation of petroleum and petroleum products, in bulk, in tank vehicles, from Pine Bend, Minn., and points within 10 miles thereof

except those in the Minneapolis-St. Paul commercial zone not otherwise authorized and except the site of the United States Air Force storage installation to points in North Dakota and South Dakota, over irregular routes.

By application in No. MC-113410 (Sub-No. 1), filed June 14, 1954, as amended, Dahlen Transport, Inc., of St. Paul, Minn., hereinafter called Dahlen, seeks a certificate authorizing the transportation of petroleum products, in bulk, from points in Anoka, Hennepin, Dakota, Ramsey, Scott and Washington Counties, Minn., except Minneapolis and St. Paul, to points in Iowa, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula of Michigan and to ports of entry on the International Boundary line between Canada, North Dakota and Minnesota, over irregular routes.

The applications in Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), and MC-107496 (Sub-No. 42) were referred to joint board No. 142 and those in Nos. MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), MC-101075 (Sub-No. 31) and MC-113410 (Sub-No. 1) to the examiner for hearing and the recommendation of appropriate orders thereon. As these matters involve related issues they were heard by the joint board and the examiner on a consolidated record. Hearing was held on July 26, September 29 and 30, and October 1, 1954 at St. Paul, Minn. Numerous rail and motor carriers oppose the granting of the applications.[2] Western Oil

[2] The applications are opposed by Chicago and Northwestern Railway Company, Northern Pacific Railway Company, Minneapolis, St. Paul & Sault St. Marie Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Class I rail carriers in western trunkline territory in all cases; by Schirmer in Nos. MC-112223 (Sub-

and Fuel Company and Great Northern Oil Company intervened in support of applicants in all proceedings. Terminal Transport Company intervened as its interests may appear in Nos. MC-103654 (Sub-No. 31), and MC-101075 (Sub-No. 31), and MC-101075 (Sub-No. 31). Briefs have been filed by Schirmer, Terminal Transport, Indianhead, Hvidsten, Transport, Inc., Dahlen and certain rail carriers.

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Shipper Testimony

Great Northern Oil Company, hereinafter called Northern, is constructing a refinery at Pine Bend, Minn. (Dakota County), approximately 11 miles south of the city limits of St. Paul, which is scheduled for completion about July 1, 1955. The plant is designed to produce approximately 25,000 barrels of liquid commodities daily and will have an initial production of approximately 17,500 barrels or 737,940 gallons daily. This production will be made up of 512,400 gallons of gasoline, 93,240 gallons of number 1 fuel oil, and 132,300 gallons of number 4 fuel oil. Num-

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No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1); by Terminal Transport in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1); by Ruan in Nos. MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1); by Indianhead in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30) MC-101075 (Sub-No. 31), and MC-113410 (Sub-No. 1); by Quickie in Nos. MC-103654 (Sub-No. 30, MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-28132 (Sub-No. 30), MC-101075 (Sub-No. 31), and MC-113410 (Sub-No. 1); by Hvidsten in Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-101075 (Sub-No. 31), and MC-113410 (Sub-No. 1); by Transport, Inc., in Nos. MC-28132 (Sub-No. 30) and MC-113410 (Sub-No. 1); and by Dahlen in Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28, and MC-112223 (Sub-No. 19).

ber 2 fuel oil will be produced in turn by blending numbers 1 and 4 fuel oils. In addition to these commodities the plant will have a daily production of approximately 70,480 gallons of liquefied petroleum gas of which 41,500 gallons will be propane and 28,980 gallons butane gas. About 75 per cent of the plant's output will be taken by Sacony-Vacuum Oil Company and approximately 5,000 barrels of the daily production will be alloted to Western Oil and Fuel Company if negotiations now under way with that company are successful. The remaining daily production will be sold to customers throughout Wisconsin. There is some likelihood that propane and butane gases may be distributed in a wider territory with some shipments going to Minnesota as well as Wisconsin. The refinery will have storage facilities for 35 days production and loading racks to accommodate rail tank cars and tank trucks. While the refinery contemplates shipments by both rail and truck it is particularly desirous of obtaining sufficient motor carrier service for the movement of its products. It believes that rail service will be too slow on occasions for its shipments and that many of its customers will not have facilities to accommodate rail shipments or will not be located on a rail line. It estimates that one day's production would total 134 truckloads if shipped entirely by motor carrier and it believes that it will require the services of all of the applicants except Terminal, Inc.

Western Oil and Fuel Company, hereinafter called Western, is engaged in the distribution of petroleum products in Minnesota, Iowa, Illinois, Nebraska, Wisconsin, North Dakota, South Dakota, and the Upper Peninsula of Michigan. It is presently negotiating with Northern to take 5,000 gallons of the latter's daily production at Pine Bend. The commodities obtained from the plant, other than liq-

uefied petroleum gas, would be distributed in Wisconsin and possibly in North Dakota and South Dakota. They would supplant to a large extent shipments now moving to these areas from Minneapolis, New Brighton and Wrenshall, Minn. If available, it would also distribute propane gas from the plant to points in Wisconsin and North Dakota in lieu of shipments of this commodity which are now made from Texas. It is presently using Schirmer and Quickie to a greater extent than other carriers in the described territory but desires all of the applicants' services available from Pine Bend if and when it has traffic moving from that point.

Sacony-Vacuum Oil Company, hereinafter called Sacony, is engaged in the production, refining, and marketing of

petroleum and petroleum products. Its marketing operations in the described territories are conducted through its White Eagle and Wadhams Divisions. The former has jurisdiction over North Dakota, South Dakota, Minnesota except the southeast portion, Iowa except the eastern portion, and seven counties in Wisconsin. The latter's jurisdiction extends over the Upper Peninsula of Michigan and the remaining portions of Minnesota, Iowa, and Wisconsin. Sacony is presently shipping the described commodities except liquefied petroleum gas into Wisconsin and the Upper Peninsula of Michigan principally by Indianhead and Terminal Transport from a barge terminal at St. Paul and the Great Lakes Pipeline terminal at Minneapolis. These sources of supply will be largely supplanted by the Pine Bend refinery when completed. Sacony is also shipping liquefied petroleum gas from Texas to points in Wisconsin and will obtain these commodities from Pine Bend

when they become available at that point. It plans to expand its distribution territory for liquefied petroleum gas and will solicit business in Minnesota and other areas where there is a market for this commodity. Sacony owns a large fleet of tank cars and will use rail service from Pine Bend when practicable. However, it will require motor carrier service for much of its traffic as rail service is not adequate in many cases where customers are not situated on a rail line or do not have facilities to handle rail shipments. It supports all of the applicants but is particularly interested in the services of Schirmer, Ruan, Terminal Transport and Indianhead.

Northwestern Refinery Company operates refineries at St. Paul Park, Minn. (located in Washington County, Minn., approximately 2 miles south of St. Paul), and at New Brighton, Minn. (located in Ramsey County, Minn., approximately 5 miles north of St. Paul). The St. Paul Park refinery has a daily production of 12,000 barrels and is being expanded to produce 30,000 barrels daily within two or three years. The New Brighton refinery has a daily production of 2,500 barrels. Shipments of gasoline, diesel and tractor fuels, road oils and liquefied petroleum gas are made from the refineries to points in North Dakota, South Dakota, Wisconsin, northern Iowa, and the Upper Peninsula of Michigan. Shipper has found Dahlen's service satisfactory in Minnesota and would like to have it available for its traffic moving to out-of-State destinations.

W. H. Barber Company is engaged in the wholesale distribution of petroleum products and would find it convenient to have Dahlen's service available from New Brighton and St. Paul Park to points in North Dakota.

Richards Oil Company has a blending plant at Minneapolis from which it ships petroleum, fuel oil, used oil,

and asphalt to customers, including road contractors, in Minnesota, North Dakota, South Dakota, Iowa and Wisconsin. It is constructing another blending plant on recently acquired acreage in Glendale Township, Scott County, Minn., about one-half mile from Savage, Minn. (located approximately 7 miles from Minneapolis limits and within 10 miles of Dakota County limits), which will go into production in January, 1955. Shipments from the latter

plant are expected to average 150 truckloads monthly of commodities similar to those produced at the Minneapolis plant and will be distributed in the five-State area described. Of such production, 15 to 20 loads are planned for distribution in North Dakota, 10 to 12 loads in South Dakota, 5 to 6 loads in Iowa, 25 loads in Wisconsin, and the balance in Minnesota. Shipper has under consideration the construction of a refinery and marine terminal at Savage which if completed would increase the volume of its traffic in the described territory. It also has considered the distribution of liquid petroleum gas from Savage but its plans in this respect are indefinite. It has used Dahlen and Hvidsten on a few occasions within their respective authorized territories and found their services satisfactory. It has no knowledge of any motor carrier service from the Savage area to points in Wisconsin and North Dakota and desires several motor carrier services available to serve this distribution territory.

Applicants' Operating Evidence

Applicants are all experienced in the transportation of petroleum products, operate compartmented, tank truck equipment, have good safety records, and are fit and able,

financially and otherwise, to conduct the proposed operations.

No. MC-103654 (Sub-No. 30).—Schirmer holds certificates authorizing the transportation of petroleum products, in bulk, in tank trucks, over irregular routes, from and to specified points and areas in Illinois, Indiana, Michigan, Minnesota, and Wisconsin. Included in such authority is the right to transport the described commodities from Minneapolis, St. Paul and New Brighton, Minn., to points in Wisconsin within 150 miles of St. Paul and to Nekoosa and Wisconsin Rapids, Wis. It maintains terminals at St. Paul and other points and operates 72 tractors and 65 tank trailers. It supports a safety program to insure the careful handling of the described commodities by its employees and has served the St. Paul river terminal of Sacony to points in its authorized territory. It is not operating at capacity and will station equipment at Pine Bend if and when the traffic justifies it. Its balance sheet, as of March 31, 1954, shows total assets of $881,174, including current assets of $157,132, liabilities of $624,013, including current liabilities of $113,733, and capital stock and surplus of $257,161. It opposes the applications in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1).

No. MC-103947 (Sub-No. 25).—Terminal Transport has authority, as material herein, as a common carrier by motor vehicle to transport petroleum products, in bulk, in tank trucks, over irregular routes, (1) from Minneapolis, St. Paul and New Brighton to points in Polk, Barron, Chippewa, Clark, Jackson, Monroe, Vernon, LaCrosse, Trempealeau, Buffalo, Eau Claire, Dunn, Pierce, St. Croix, Pepin, Crawford, Juneau, Marathon, Ruhland, Sauk, Taylor and Wood Counties, Wis., and to points within 100

miles of St. Paul in Douglas, Burnett, Washburn, Sawyer and Rusk Counties, Wis., and (2) from Winona, Minn., to points in Wisconsin within 100 miles of Winona. It

maintains terminals at St. Paul and other points and operates 29 tractors and 37 trailers. It serves Saeony from the Great Lakes Pipeline and St. Paul barge terminals to destinations in Wisconsin. Its balance sheet, as of May 31, 1954, shows total assets of $128,408, including current assets of $62,021, liabilities of $65,472, including current liabilities of $52,911, and capital stock and surplus $62,936. It opposes the applications in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1).

No. MC-107496 (Sub-No. 42).—Ruan holds certificates authorizing the transportation of petroleum products, in bulk, in tank vehicles, over irregular routes, from and to specified points and areas in Illinois, Iowa, Minnesota, Missouri, Nebraska, and Wisconsin. Included in such authority is the right to transport the described commodities from Minneapolis, St. Paul and New Brighton, Minn., to points in Barron, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Jackson, Eau Claire, LaCrosse, Marathon, Monroe, Pepin, Pierce, Polk, Rusk, St. Croix, Taylor, Trempealeau, Washburn, and Wood Counties, Wis. It maintains terminals at a number of points including New Brighton which is approximately 24 miles from Pine Bend and operates 172 tractors and 233 tank trailers. It has a safety program to insure the safe handling of the described commodities and serves the principal oil companies in its authorized territory including Sacony. Its balance sheet, as of August 14, 1954, shows total assets of $2,073,515, including cur-

rent assets of $1,531,858, liabilities of $1,023,149, including current liabilities of $653,721, and net worth $1,050,366. For the period January 1 to August 14, 1954, inclusive, its operations resulted in a net profit after taxes of $48,530. It opposes the applications in Nos. MC-112223 (Sub-No. 19), MC-113410 (Sub-No. 1), MC-108449 (Sub-No. 28), and MC-28132 (Sub-No. 30).

No. MC-108449 (Sub-No. 28).—Indianhead has authority, as material herein, as a common carrier by motor vehicle to transport petroleum products, in bulk, in tank vehicles, over irregular routes, from and to specified points and areas in Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin. Included in such authority is the right to transport the described commodities (1) from Minneapolis and St. Paul and points within 5 miles of St. Paul to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St. Paul except those in Houghton and Keweenaw Counties, Mich., (2) from Minneapolis and St. Paul and points within 10 miles of each to points in Iowa and South Dakota, and (3) from Minneapolis and New Brighton and points within 10 miles of each to Wahpeton, Fargo, Grand Forks, and Jamestown, N. Dak., and points within 10 miles of each. It maintains terminals at St. Paul and other points and operates 114 tractors and 110 tank trailers. It has a safety program to instruct its employees in the careful handling of the described commodities and renders "key-stop" service whereby deliveries are made at destinations in the absence of consignees who have furnished the carrier with keys to their storage facilities. It serves the major oil companies including Sacony from the Twin Cities area to points in Wisconsin and Upper Michigan. Its balance sheet, as of June 30, 1954, shows total assets of $829,695, including current

assets of $222,682, liabilities of $403,578, including current liabilities of $207,192, and net worth

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$426,117. For the period from January 1 to June 30, 1954, inclusive its operations resulted in a net profit of $41,179. It opposed the applications in Nos. MC-112223 (Sub-No. 19), MC-101075 (Sub-No. 31), MC-113410 (Sub-No. 1), and MC-28132 (Sub-No. 30).

No. MC-112223 (Sub-No. 19).—Quickie has certificates authorizing the transportation of various liquid commodities, over irregular routes, from and to specified points and areas in Iowa, Minnesota, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula of Michigan. Included in such authority is the right to transport petroleum products, in bulk, in tank vehicles, from Superior, Wis., and Wrenshall, Minn., to points in Iowa, Minnesota, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula of Michigan. It maintains terminals at Minneapolis and other points and operates 28 tractors and 32 tank trailers. It has a safety program for the instruction of its employees and special appliances to insure the safe handling of the described commodities. It serves a large number of shippers including Sacony and during the period May 1, 1953 to May 31, 1954, inclusive, transported 107,533,972 gallons of liquid commodities within its authorized territory. Its balance sheet, as of February 28, 1954 shows total assets of $131,068, including current assets of $67,637, liabilities of $65,535 including current liabilities of $32,369, and capital stock and surplus of $65,533. For the two months ending February 28, 1954, its operations resulted in a net profit of $5,219. It opposes the applications in Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-

No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-28132 (Sub-No. 30), MC-101075 (Sub-No. 31), and MC-113410 (Sub-No. 1).

No. MC-28132 (Sub-No. 30).—Hvidsten has authority, as material herein, as a common carrier by motor vehicle to transport petroleum products, in bulk, in tank trucks, over irregular routes, (1) from Superior, Wis., to (a) points in a specified area in Minnesota, and (b) points in specified areas in Kittson, Roseau, Marshall, Pennington, Red Lake and Polk Counties, Minn., (2) from Superior, Wis., and Duluth, Minn., to points in a specified area in North Dakota, (3) from Alexandria and Mankato, Minn., and points in Minnesota within 10 miles of each, points in Hennepin and Ramsey Counties, Minn., points in Woodbury, Afton, Cottage Grove and Denmark Townships, Washington County, Minn., and points in Dakota County, Minn., north of the southern boundary of Burnsville, Lebanon, and Rosemont Townships to points in North Dakota, (4) from Fargo and Grand Forks, N. Dak., and points in North Dakota within 10 miles of each to (a) points in Roseau, Kittson, Marshall, Pennington, Red Lake, Polk, Norman, Mahnomen, Clay, Becker and Clearwater Counties, Minn., and (b) points in a specified area in Minnesota not including those in the counties under item (a) above, (5) from Fargo and Grand Forks to points in North Dakota on and east of North Dakota Highway 32, and (6) from the site of the United States Air Force storage installation near Hastings, Minn., to Fargo Municipal Airport at or near Fargo. It maintains terminals at Alexandria, Fargo, and Grand Forks and operates

19 tractors and 26 tank trailers. Shipments originating in the Twin Cities area for North Dakota are customarily handled by equipment dispatched from Fargo which is approximately 250 miles from Minneapolis. It contemplates the establishment of a terminal in the Twin Cities area and has an arrangement at St. Paul for dispatching its equipment when in that vicinity. It also has an agreement with Dahlen whereby some shipments are moved to North Dakota points in the latter's equipment. During November 1, 1953 to August 31, 1954, inclusive, it transported 276 shipments of the described commodities from the Twin Cities area to North Dakota, 141 of which were moved for Phillips Petroleum Company, 80 for W. H. Barber Company, 15 for the Texas Company, 15 for Northwestern Refining Company, 9 for Farmers Union Central Exchange, 7 for Pure Oil Company, 4 for Western Oil and Fuel Company, 3 for Osky Brothers Petroleum Company, and 1 each for H. K. Shawl Company and Penn-Tex Oil Corporation. It asserts that of the 141 shipments transported for Phillips, 6 were handled in November 1953 without delay, 8 in December, 1953 with 1 delay, 21 in January, February and March 1954, without delay, 28 in April 1954 with 1 delay, 28 in May 1954, with 3 delays, and 50 in June, July, and August 1954 with 1 delay. Deliveries in North Dakota are customarily made on the same day they are picked up in the Twin Cities area sometimes after 6 p.m. in which event the consignees are notified of the late arrival of the truck. Hvidsten's balance sheet, as of December 31, 1953, shows total assets of $370,856 including current assets of $58,287, liabilities of $34,671, and capital stock and surplus of $336,185. It opposes the applications in Nos. MC-

103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-101075 (Sub-No. 31), and MC-113410 (Sub-No. 1).

No. 101075 (Sub-No. 31).—Transport, Inc. has been granted certificates authorizing the transportation, over irregular routes, (1) of petroleum products, in bulk, in tank vehicles, (a) from Superior, Nebr., and Champlin, Iowa, to points in North Dakota on and east of U. S. Highway 83 and those in a specified area in Minnesota, (b) from Fargo and Grand Forks, N. Dak., and points in North Dakota within 5 miles of each and from Watertown, S. Dak., and points within 5 miles thereof to points in the above-specified Minnesota territory, (c) from Sioux Falls, S. Dak., and points within 5 miles thereof to points in North Dakota on and east of U. S. Highway 83, (d) from Rock Rapids, Iowa, and points in Iowa within 10 miles of Rock Rapids to points in specified areas in Minnesota, (e) from Superior, Wis., to points in a specified area in Minnesota, and (f) from the site of the United States Air Force storage installation near Hastings, Minn., to Fargo Municipal Airport at or near Fargo, Rapid City Air Force Base at or near Rapid City, S. Dak., and Sioux Falls Municipal Airport at or near Sioux Falls, S. Dak., and (2) of aviation gasoline, in bulk, in tank vehicles, moving on Government bills of lading from Sinclair, Wyo., to Fargo Municipal Airport at or near Fargo, N. Dak. It maintains terminals at Moorhead and Alexandria, Minn., and Fargo, N. Dak., and operates 31 tractors and 28 trailers. It has an adequate safety program and serves several major oil companies including Sacony from Fargo, Grand Forks and Sioux Falls to Minnesota destinations.

Its balance sheet, as of March 31, 1954, shows total assets of $162,388, liabilities of $27,009, and net worth of $135,379. It opposes the applications in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1).

No. MC-113410 (Sub-No. 1).—Dahlen has a certificate authorizing the transportation of petroleum products, in bulk, in tank vehicles, over irregular routes, from Minneapolis and St. Paul and points within 10 miles of each and Alexandria, Minn., to the port of entry on the boundary of the United States and Canada at o. near International Falls, Minn. It also holds authority to transport the described commodities from the Twin Cities to points in Minnesota. It maintains terminals at St. Paul and other points and operates 37 tractors and 43 tank trailers. It has a progressive safety program to insure the careful handling of petroleum products by its employees. In 1953, it transported approximately 123,700,000 gallons of such commodities in Minnesota 40 per cent of which were moved for Sacony. It understands that additional facilities are under construction or contemplated at several points in Washington, Anoka and Dakota Counties, Minn., and it has sufficient equipment to handle additional traffic. Its balance sheet, as of June 30, 1954, shows total assets of $265,252, including current assets of $78,699, liabilities of $118,800, and net worth of $146,452. It opposes the applications in No. MC-103654 (Sub-No. 30), MC-107496 (Sub-No. 42), MC-103947 (Sub-No. 25), MC-108449 (Sub-No. 28), and MC-112223 (Sub-No. 19).

Protestants' Evidence

By stipulation at the hearing it is agreed that the operating testimony adduced by applicants herein in support of their respective applications should be considered in connection with the several applications opposed by them. It is also agreed that the territories involved in the respective applications are served by rail carriers handling petroleum and petroleum products, in bulk, in tank car equipment, that rail revenues derived from such traffic have fallen off during recent years, and that rail carriers desire additional traffic of this nature to assure their economical and efficient operation in the future.

Northern Pacific Railway Company operates a system of rail lines extending generally between Chicago, on the east, and Seattle, Wash., on the west. It owns and operates 10,620 miles of road track, maintains 1,465 agency and nonagency stations, and has made large investments in improving track, equipment and freight handling facilities in recent years. It handles a considerable volume of petroleum products and such traffic accounted for 4.75 per cent of its total freight revenue in 1953. The revenues derived from the transportation of petroleum products have decreased since 1948 and it desires additional traffic of this nature in the described territories. It is able to serve the Pine Bend refinery through connection with Minnesota Transfer and Great Western Railway Company and affords daily service to points in North Dakota.

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Discussion and Conclusions

These applications each seek authority to serve Northern's new refinery at Pine Bend which is scheduled to com-

mence production during the summer of 1955. Certain additional authority is also sought by several of the applicants which will be discussed hereinafter. With respect to Pine Bend, the record shows that the refinery will have an initial production of approximately 17,500 barrels of petroleum products daily and a capacity production at a later date of 25,000 barrels daily. This output will be taken for the most part by oil companies engaged in marketing operations and the balance will be distributed by the refinery itself. As shown, Sacony has contracted for approximately 75 per cent of the plant's production for distribution in Wisconsin and the Upper Peninsula of Michigan. This gallonage will supplant that presently procured from sources at Minneapolis and St. Paul. Western is negotiating to take approximately 5,000 gallons of petroleum products daily from the plant for distribution in Wisconsin, North Dakota and South Dakota and this gallonage would supplant that presently obtained from Minneapolis and New Brighton and to a limited extent from Wrenshall, Fargo, and Grand Forks. Pine Bend production which is not taken by marketing companies will be sold direct by the refinery to consumers in Wisconsin. Northern, Sacony and Western assert a need for both rail and motor carrier services to handle their shipping requirements when the refinery is completed. They are particularly concerned that there be sufficient motor carrier service available in addition to rail to handle shipments requiring expeditious deliveries and those consigned to customers not located on a rail line or which do not have facilities to handle rail shipments. They agree that several motor carriers will be needed to handle their respective shipping requirements. However, it is clear that until the refinery is actually in operation and the distribution of its products commenced the number of motor car-

rier services that will be needed in the described territory is speculative to a great extent. Northern believes that all of the applicants except Terminal, Inc., should be authorized, Sacony favors Schirmer, Ruan, Terminal Transport and Indianhead but supports all of the applicants, and Western appears to favor Schirmer and Quickie but desires the services of all of the applicants. It is evident that shipments from Pine Bend will move principally to points in Wisconsin and the upper Peninsula of Michigan and will supplant traffic now moving from sources of supply at Minneapolis, St. Paul and Wrenshall. Several of the applicants are presently authorized to serve all or a portion of the destination territory involved in Wisconsin and Michigan as well as the origin points from which the traffic is presently moving. Schirmer, Terminal Transport, Ruan and Indianhead operate from Minneapolis and St. Paul and Quickie from Wrenshall to points in Wisconsin and/or Michigan. The three remaining applicants do not fit into this category. Hvidsten and Transport, Inc., do not serve any of the three origins and are confined to destinations in North Dakota and South Dakota. Dahlen operates from the Minneapolis-St. Paul area to the Port of Entry on the United States-Canada border.

No. MC-103654 (Sub-No. 30) Sheet 14

While there is no contention here that the "follow-the-traffic" principle as set out in Smith & Soloman Trucking Co. Extension—Camden, N. J., 61 M. C. C. 748, is applicable, special consideration should be accorded those carriers presently serving the origins which will be affected by this new source of supply at Pine Bend and which already have authority to serve the destination areas involved. Considering all of the evidence, it is concluded that Schirmer,

Terminal Transport, Ruan, Indianhead and Quickie should be authorized to handle the described traffic from the site of the Pine Bend refinery to the destination areas designated hereinafter and that such services will be sufficient to handle shippers' motor carrier traffic from the Pine Bend refinery.

As shown, several shippers assert a need for applicants' services from origins other than Pine Bend. Northwestern Refining Company which operates refineries at St. Paul Park (approximately 2 miles south of St. Paul) and New Brighton (approximately 5 miles north of St. Paul) desires Dahlen's service to points in North Dakota, South Dakota, Wisconsin, Northern Iowa and the Upper Peninsula of Michigan and W. H. Barber Company, a wholesale distributor of petroleum products, desires to use Dahlen's service from the same origins to points in North Dakota. These shippers do not assert any dissatisfaction with existing carriers and apparently are not familiar with the services now available for the movement of their traffic. As shown, Indianhead holds authority to transport the described commodities from St. Paul Park and New Brighton to points in Iowa, South Dakota, those in Wisconsin and Michigan within 275 miles of St. Paul (except points in Houghton and Keweenaw Counties, Mich.), and Wahpeton, Fargo, Grand Forks, and Jamestown, N. Dak., and points within 10 miles of each. In addition, Schirmer, Terminal Transport and Ruan hold authority from the described origins to a large portion of Wisconsin and Hvidsten to points in North Dakota. Rail service is also available throughout the described territory. In the circumstances, it does not appear that there is any need for additional service from the refinery sites to the territory stated.

Richards Oil Company is constructing a blending plant near Savage, Minn. (approximately 7 miles from Minneapolis, Minn.), which is scheduled for production in January, 1955. Shipments of petroleum products will be made from the plant to points in North Dakota, South Dakota, Iowa, and Wisconsin and shipper desires motor carrier service to handle the traffic. It is unfamiliar with Indianhead's service to points in South Dakota and Iowa and to the specified points in North Dakota that the carrier is authorized to serve. No inadequacy in such service is shown and no need has been established for additional service in the territory served by this carrier. In the circumstances, it must be concluded that shipper should only be afforded the service proposed by Dahlen from the blending plant to points in Wisconsin and those in North Dakota except Wahpeton, Fargo, Grand Forks, and Jamestown and points within 10 miles of each.

No. MC-103654 (Sub-No. 30) Sheet 15

Findings

In No. MC-103654 (Sub-No. 30), the joint board finds that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in appendix XIII to the report in Descriptions in Motor Carrier Certificates, 61 M. C. C. 209, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn. (Dakota County, Minn.) to points in Wisconsin within 150 miles of St. Paul, Minn., and to Nekoosa and Wisconsin Rapids, Wis.

In No. MC-103947 (Sub-No. 25), the joint board finds that the present and future public convenience and neces-

sity require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix XIII to the report in Descriptions in Motor Carrier Certificates, 61 M. C. C. 209, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in Polk, Barron, Chippewa, Clark, Jackson, Monroe, Vernon, LaCrosse, Trempealeau, Buffalo, Eau Claire, Dunn, Pierce, St. Croix, Pepin, Crawford, Juneau, Marathon, Richland, Sauk, Taylor, and Wood Counties, Wis., and to points in Douglas, Burnett, Washburn, Sawyer, and Rusk Counties, Wis., within 100 miles of St. Paul.

In No. MC-107496 (Sub-No. 42), the joint board finds that the public convenience and necessity require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum and petroleum products, in bulk, in tank vehicles, as described in Appendix XIII to the report in Descriptions in Motor Carrier Certificates, 61 M. C. C. 209, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in Barron, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Jackson, Eau Claire, LaCrosse, Marathon, Monroe, Pepin, Pierce, Polk, Rusk, St. Croix, Taylor, Trempealeau, Washburn, and Wood Counties, Wis.

In No. MC-108449 (Sub.-No. 28), the examiner finds that the public convenience and necessity require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix XIII to the report in Descriptions in Motor Carrier Certificates, 61 M. C. C. 209, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St.

Paul, Minn., except those in Houghton and Keweenaw Counties, Mich.

In No. MC-112223 (Sub-No. 19), the examiner finds that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum and petroleum products, in bulk, in tank vehicles, as described in Appendix XIII to the report in Descriptions in Motor Carrier Certificates, 61 M. C. C. 209, from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn., to points in Wisconsin and the Upper Peninsula of Michigan.

In No. MC-113410 (Sub-No. 1), the examiner finds that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix XIII to the report in Descriptions in Motor Carrier Certificates, 61 M. C. C. 209, from the site of the Richards Oil Company's blending plant at Savage, Minn. (approximately 7 miles from Minneapolis, Minn.) to points in North Dakota and Wisconsin.

In each of the foregoing proceedings, the joint board or the examiner further finds that each applicant is fit, willing, and able properly to perform the described service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that certificates authorizing the described operations should be issued; and that the applications in all other respects should be denied.

In Nos. MC-28132 (Sub-No. 30), and MC-101075

(Sub-No. 31), the examiner finds that applicants have failed to establish that the present or future public convenience and necessity require their proposed operations, and that the applications should be denied.

In view of the findings herein, the joint board and the examiner recommended that the appended orders be entered.

By joint board No. 142 in Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), and MC-107496 (Sub-No. 42).

By Allan F. Borroughs, Examiner, in Nos. MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), MC-101075 (Sub-No. 31), and MC-113-410 (Sub-No. 1).

(Signature) Wm. P. O'Donnell,
(Signature) Calmer Browy,
(Signature) Allan F. Borroughs.

Recommended by joint board No. 142, composed of William P. O'Donnell of Minnesota and Calmer Browy of Wisconsin.

(Signature) Wm. P. O'Donnell,
(Signature) Calmer Browy.

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the — day of ————, A. D. 1955.

No. MC-103654 (Sub-No. 30)
Schirmer Transportation Company, Inc.
Extension—Pine Bend, Minn.

No. MC-103947 (Sub-No. 25)
Terminal Transport Co. Extension—Pine Bend, Minn.

No. MC-107496 (Sub-No. 42)
Ruan Transport Corporation Extension
Pine Bend, Minn.

Investigation of the matters and things involved in these proceedings having been made, said applications upon due notice having been heard by joint board No. 142, which board has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceedings having been duly submitted:

It is ordered, That upon full compliance with the requirements of Sections 215 and 217 of the Interstate Commerce Act, and with our rules and regulations thereunder, certificates be issued to applicants authorizing operations, in interstate or foreign commerce, as common carriers by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

It is further ordered, That the applications in all other respects be, and they are hereby, denied.

And it is further ordered, That this order shall be effective on ————————.

By the Commission, division 5.

HAROLD D. McCOY,
Secretary.

(SEAL)

Recommended by Allan F. Borroughs, Examiner.

(Signature) Allan F. Borroughs.

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the — day of ————, A. D. 1955.

No. MC-108449 (Sub-No. 28)
Indianhead Truck Line, Inc. Extension—Pine Bend, Minn.

No. MC-112223 (Sub-No. 19)
Quickie Transport Company Extension—Pine Bend, Minn.

No. MC-28132 (Sub-No. 30)
Hvidsten Transport, Inc. Extension
Dakota County, Minn.

No. MC-101075 (Sub-No. 31)
Transport, Inc. Extension—Pine Bend, Minn.

No. MC-113410 (Sub-No. 1)
Dahlen Transport, Inc. Extension—North Dakota

Investigation of the matters and things involved in these proceedings having been made, said applications upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceedings having been duly submitted:

It is ordered, That upon full compliance with the requirements of Sections 215 and 217 of the Interstate Commerce Act, and with our rules and regulations thereunder, certificates be issued to applicants in Nos. MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), and MC-113-410 (Sub-No. 1), authorizing operations in interstate or foreign commerce, as common carriers by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

It is further ordered, That the applications in all other respects be, and they are hereby, denied.

And it is further ordered, That this order shall be effective on ————.

By the Commission, division 5.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX B

[Portions relating to applications not involved in this appeal have been omitted as indicated]

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

Interstate Commerce Commission

No. MC-101075 (Sub-No. 17)[1]

Transport, Inc., Extension - Minnesota - North Dakota

Served July 23, 1956

Decided July 2, 1956

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1. In No. MC-101075 (Sub-No. 17), on reconsideration, findings in prior report, M.C.C., affirmed. Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle of petroleum products, in bulk, in tank vehicles, by motor vehicles,

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[1] This report also embraces Nos. MC-108449 (Sub-No. 29) Indianhead Truck Line, Inc., Extension—North Dakota; MC-103654 (Sub-No. 30) Schirmer Transportation Company, Inc., Extension—Pine Bend, Minn.; MC-103947 (Sub-No. 25) Terminal Transport Co., Extension—Pine Bend, Minn; (On 2-6-56, in No. MC-F-6081, Division 4 approved the acquisition of Terminal Transport Co. by Ruan Transport Corporation), MC-107496 (Sub-No. 42) Ruan Transport Corporation Extension—Pine Bend, Minn.; MC-108449 (Sub-No. 28) Indianhead Truck Line, Inc., Extension—Pine Bend, Minn.; MC-112223 (Sub-No. 19) Quickie Transport Company Extension—Pine Bend, Minn.; MC-28132 (Sub-No. 30) Hvidsten Transport, Inc., Extension—Dakota County, Minn.; and MC-113410 (Sub-No. 1) Dahlen Transport, Inc., Extension—North Dakota.

from points in a specified territory in Minnesota to points in North Dakota, over irregular routes. Application denied.

2. In No. MC-108449 (Sub-No. 29), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from Minneapolis and St. Paul, Minn., and points within 5 miles of St. Paul to points in a specified portion of Minnesota.

3. In No. MC-103654 (Sub-No. 30), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery, at or near Pine Bend, Minn., and points within 2 miles of Pine Bend, to points in Wisconsin within 150 miles of St. Paul, Minn., and to Nekoosa and Wisconsin Rapids, Wis.

No. MC-101075 (Sub-No. 17) Sheet 2

4. In No. MC-103947 (Sub-No. 25), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery, at or near Pine Bend, Minn., and points within 2 miles of Pine Bend, to points in specified counties and areas in Wisconsin not duplicated by authority granted in No. MC-107496 (Sub-No. 42).

5. In No. MC-107496 (Sub-No. 42), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles,

from the site of the Great Northern Oil Company's refinery, at or near Pine Bend, Minn., and points within 2 miles of Pine Bend to points in specified counties in Wisconsin.

6. In No. MC-108449 (Sub-No. 28), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery, at or near Pine Bend, Minn., and points within 2 miles of Pine Bend, to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St. Paul, Minn., except those in Houghton and Keweenaw Counties, Mich.

7. In No. MC-28132 (Sub-No. 30), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Richards Oil Company's plant at or near Savage, Minn., to points in Wisconsin and those in North Dakota except Wahpeton, Fargo, Grand Forks and Jamestown, and points within 10 miles thereof.

8. In No. MC-113410 (Sub-No. 1), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from the site of the Richards Oil Company's plant at or near Savage, Minn., to points in Wisconsin and those in North Dakota except Wahpeton, Fargo, Grand Forks and Jamestown and points within 10 miles thereof.

9. In Nos. MC-108449 (Sub-No. 29), MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-28132

(Sub-No. 30), and MC-113410 (Sub-No. 1), issuance of certificates approved upon compliance by applicants with certain conditions and applications in all other respects denied.

No. MC-101075 (Sub-No. 17) Sheet 3

10. In No. MC-112223 (Sub-No. 19), public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum and petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery, at or near Pine Bend, Minn., and points within 10 miles thereof with certain exceptions, to points in Iowa, North Dakota, South Dakota, Wisconsin and the Upper Peninsula of Michigan. Application denied.

Appearances as shown in prior report in No. MC-101075 (Sub-No. 17).

Glenn W. Stephens for applicants in Nos. MC-108449 (Sub-No. 29) and MC-108449 (Sub-No. 28) and for intervener in opposition in Nos. MC-112223 (Sub-No. 19), MC-101075 (Sub-No. 31), MC-113410 (Sub-No. 1), and MC-28132 (Sub-No. 30).

Donald A. Morken for applicants in Nos. MC-103654 (Sub-No. 30) and MC-101075 (Sub-No. 31) and for protestants in Nos. MC-108449 (Sub-No. 29), MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1).

Leonard E. Lindquist for applicant in No. MC-103947 (Sub-No. 25), for interveners in opposition in Nos. MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1) and for intervener as its interests appear in Nos. MC-103654 (Sub-No. 30), MC-101075 (Sub-No. 31) and MC-108449 (Sub-No. 29).

Rex Fowler and *Henry Fabritz* for applicant in No. MC-107496 (Sub-No. 42) and for intervener in opposition in Nos. MC-108449 (Sub-No. 29), MC-112223 (Sub-No. 19), MC-113410 (Sub-No. 1), MC-108449 (Sub-No. 28), and MC-28132 (Sub-No. 30).

Gordon Rosenmeier for applicant in No. MC-112223 (Sub-No. 19) and for protestant in Nos. MC-108449 (Sub-No. 29), MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 11).

Alan Foss for applicant in No. MC-28132 (Sub-No. 30) and for intervener in opposition in Nos. MC-108449 (Sub-No. 29), MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), and MC-113410 (Sub-No. 1).

Thomas W. Walsh and *Lawrence C. Merthan* for applicant in No. MC-113410 (Sub-No. 1) and for protestant in Nos. MC-103654 (Sub-No. 30), MC-107496 (Sub-No. 42), MC-103947 (Sub-No. 25), MC-108449 (Sub-No. 28) and MC-112223 (Sub-No. 19).

George R. Watson and *Robert G. Little* for interveners in support of applicants in all proceedings except No. MC-101075 (Sub-No. 17).

R. W. Cronon, Stuart W. Rider, Frank S. Farrell and *Charles H. Clay* for interveners in opposition in all proceedings except No. MC-101075 (Sub-No. 17).

No. MC-101075 (Sub-No. 17) Sheet 4

Report Of The Commission[2]

By The Commission:

These cases are closely related both in subject matter and participants and they will be disposed of here in a single report:

In a prior report in No. MC-101075 (Sub-No. 17), decided March 15, 1955, division 5 denied the application in toto. Upon consideration of a petition of Transport, Inc., and of replies by Indianhead Truck Line, Inc., and Hvidsten Transport, Inc., by order of August 18, 1955, this proceeding was reopened for reconsideration on the present record in a consolidated report with No. MC-108449 (Sub-No. 29). The application in the latter proceeding was heard upon a consolidated record with the remaining applications under consideration herein, but was the subject of a single report and recommended order by an examiner. All of the remaining applications were considered in a single report with a recommended order by a joint board in Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), and MC-107496 (Sub-No. 42), and a recommended order by an examiner in Nos. MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1).

Applicants in Nos. MC-108449 (Sub-No. 28), MC-108449 (Sub-No. 29), MC-113419 (Sub-No. 1), and MC-28132 (Sub-No. 30) each filed exceptions to the orders

[2] On reconsideration in No. MC-101075 (Sub-No. 17) and as the initial report of the Commission in Nos. MC-108449 (Sub-No. 29), MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1).

recommended in their respective proceedings. Hvidsten Transport, Inc., filed exceptions to the orders recommended in No. MC-108449 (Sub-No. 29)

No. MC-101075 (Sub-No. 17; Sheet 5

and MC-113410 (Sub-No. 1) and replied to applicant's exceptions in No. MC-108449 (Sub-No. 28). Transport, Inc., filed exceptions to the order recommended in No. MC-108449 (Sub-No. 29). Indianhead Truck Line, Inc., filed exceptions to the order recommended in No. MC-112223 (Sub-No. 19) and replied to exceptions of Hvidsten Transport, Inc., Transport, Inc., and rail carriers in No. MC-108449 (Sub-No. 29) and to exceptions of Dahlen Transport, Inc., in No. MC-113410 (Sub-No. 1). Quickie Transport Company replied to exceptions of Indianhead Truck Line, Inc., in No. MC-112223 (Sub-No. 19). Rail carriers filed exceptions to the orders recommended in all cases except No. MC-28132 (Sub-No. 30). Schirmer Transportation Company, Inc., replied to the exceptions filed in all cases.

In its petition for reconsideration in No. MC-101075 (Sub-No. 17), Transport, Inc. contends that division 5 erred on the facts and the law and that its conclusions are not supported by the evidence and are not consistent with the decisions on contemporary applications seeking similar authority in the general territory involved. On exceptions to the reports and recommended orders of the examiner and joint board in the remaining cases, parties raise some question as to the accuracy of certain statements of fact and conclusions. The pertinent facts of record will be set out in sufficient detail herein for clarity of discussion of the issues and matters involved.

Authorities Sought By Applicants

In No. MC-101075 (Sub-No. 17), by application filed February 16, 1953, Transport, Inc., of Moorhead, Minn., hereinafter called Transport, seeks a certificate of public

No. MC-101075 (Sub-No. 17) Sheet 6

convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from points in Hennepin and Ramsey Counties, Minn., points in Woodbury, Afton, Cottage Grove, and Denmark Townships, Washington County, Minn., and those in that part of Dakota County, Minn., north of the southern boundaries of Burnsville, Lebanon, and Rosemount Townships, to points in North Dakota, and of rejected shipments of such commodities on return.

In No. MC-108449 (Sub-No. 29), by application filed May 10, 1954, as amended, Indianhead Truck Line, Inc., of St. Paul, Minn., hereinafter called Indianhead, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products and all derivatives, in bulk, in tank vehicles, (1) from Minneapolis and St. Paul, Minn., and points within 10 miles of each, to points in North Dakota and those in Minnesota on and east of U. S. Highway 53 between Duluth, Minn., and the United States-Canada International boundary line, (2) from Minneapolis and St. Paul and points within 10 miles of each, including Pine Bend, Minn., to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St. Paul except those in Houghton and Keweenaw Counties, Mich., and (3) from Minneapolis, St. Paul, and New Brighton, Minn., and points within 10

miles of each, excluding Pine Bend, to Wahpeton, Fargo, Grand Forks, and Jamestown, N. Dak., and points within 10 miles of each.

No. MC-101075 (Sub-No. 17) Sheet 7

In No. MC-103654 (Sub-No. 30), by application filed April 6, 1954, as amended, Schirmer Transportation Company, Inc., of St. Paul, Minn., hereinafter called Schirmer, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend, Minn., and points within 1 mile thereof, to points in Wisconsin within 150 miles of St. Paul, Minn., and to Nekoosa and Wisconsin Rapids, Wis., over irregular routes.

In No. MC-103947 (Sub-No. 25), by application filed April 7, 1954, as amended, Terminal Transport Company, a corporation, of St. Paul, hereinafter called Terminal Transport, seeks a certificate authorizing the transportation of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend and points within 1 mile thereof, to points in Polk, Barron, Chippewa, Clark, Jackson, Monroe, Vernon, LaCrosse, Trempealeau, Buffalo, Eau Claire, Dunn, Pierce, St. Croix, Pepin, Crawford, Juneau, Marathon, Richland, Sauk, Taylor and Wood Counties, Wis., and to points in Douglas, Burnett, Washburn, Sawyer and Rusk Counties, Wis., within 100 miles of St. Paul, over irregular routes.

In No. MC-107496 (Sub-No. 42), by application filed April 5, 1954, as amended, Ruan Transport Corporation, of Des Moines, Iowa, hereinafter called Ruan, seeks a certi-

ficate authorizing the transportation of petroleum and petroleum products including chemicals derived from petroleum and

No. MC-101075 (Sub-No. 17) Sheet 8

compounded oils having a petroleum base, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend and points within 1 mile thereof, to points in Barron, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Jackson, Eau Claire, La Crosse, Marathon, Monroe, Pepin, Pierce, Polk, Rusk, St. Croix, Taylor, Trempealeau, Washburn, and Wood Counties, Wis., over irregular routes.

In No. MC-108449 (Sub-No. 28), by application filed April 12, 1954, Indianhead seeks a certificate authorizing the transportation of petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend and points within 1 mile thereof, to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St. Paul (except those in Houghton and Keweenaw Counties, Mich.), points in Iowa and South Dakota, and Wahpeton, Fargo, Grand Forks, and Jamestown, N. Dak., and points within 10 miles of each, over irregular routes.

In No. MC-112223 (Sub-No. 19), by application filed May 3, 1954, as amended, Quickie Transport Company, a corporation, of Minneapolis, Minn., hereinafter called Quickie, seeks a certificate authorizing the transportation of petroleum and petroleum products including chemicals derived from petroleum, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's new refinery at Pine Bend and points within 10 miles thereof except the United States Air Force storage installation (near Has-

tings, Minn.) and points within the Minneapolis-St. Paul Minn., commercial zone, to points in Iowa, North Dakota, South Dakota, Wisconsin and the Upper Peninsula of Michigan, over irregular routes.

No. MC-101075 (Sub-No. 17) Sheet 9

In No. MC-28132 (Sub-No. 30), by application filed August 2, 1954, as amended, Hvidsten Transport, Inc., of Fargo, N. Dak., hereinafter called Hvidsten, seeks a certificate authorizing the transportation of petroleum and petroleum products, in bulk, in tank vehicles, from points in Dakota County, Minn., and points within 10 miles thereof except those in the Minneapolis-St. Paul commercial zone not otherwise authorized and except the site of the United States Air Force storage installation, to points in Iowa, North Dakota, South Dakota, Wisconsin and the Upper Peninsula of Michigan, over irregular routes.

In No. MC-113410 (Sub-No. 1), by application filed June 14, 1954, as amended, Dahlen Transport, Inc., of St. Paul, Minn., hereinafter called Dahlen, seeks a certificate authorizing the transportation of petroleum products, in bulk, from points in Anoka, Hennepin, Dakota, Ramsey, Scott and Washington Counties, Minn., except Minneapolis and St. Paul, to points in Iowa, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula of Michigan and to ports of entry on the International Boundary line between Canada, North Dakota and Minnesota, over irregular routes.

Present Authorities And Facilities Of Applicants

Applicants are all now engaged as motor common carriers in the transportation of petroleum products, they operate substantial fleets of tank truck equipment, and all

are fit and able, financially and otherwise, to conduct the proposed operations.

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Transport has authority to transport the considered commodities from Superior, Nebr., Champlin and Rock Rapids, Iowa, Fargo and Grand Forks, N. Dak., Watertown and Sioux Falls, S. Dak., and Superior, Wis. to specified territories in North Dakota and Minnesota. It also holds authority from the site of the United States Air Force storage installation near Hastings, Minn. to certain airports and installations including Fargo Municipal Airport at or near Fargo. This latter authority is embraced in that sought herein. It operates in intrastate commerce in both North Dakota and Minnesota and maintains terminals at Moorhead and Grand Forks and relay stations at Leeds, Medina, and Jamestown, N. Dak. It operates 32 tractors and 33 tank trailers and renders "key-stop" service whereby deliveries are made at destinations in the absence of consignees who have furnished the carrier with keys to their storage facilities. Its balance sheet, as of September 30, 1953, shows total assets of $187,928, liabilities of $55,629, and a net worth of $132,299.

Schirmer holds certificates authorizing the transportation of petroleum products from and to specified points and areas in Illinois, Indiana, Michigan, Minnesota and Wisconsin. Included in such authority is the right to transport the described commodities from Minneapolis, St. Paul and New Brighton, Minn., to points in Wisconsin within 150 miles of St. Paul and to Nekoosa and Wisconsin Rapids, Wis. It maintains terminals at St. Paul and other points and operates 72 tractors and 65 tank trailers. Its balance sheet, as of March 31, 1954, shows total assets of $881,174, including current assets of $157,132,

liabilities of $624,013, including current liabilities of $113,733, and capital stock and surplus of $257,161.

Terminal Transport has authority, as material herein, to transport the described commodities (1) from Minneapolis, St. Paul and New Brighton to points in Polk, Barron, Chippewa, Clark, Jackson, Monroe, Vernon, LaCrosse, Trempealeau, Buffalo, Eau Claire, Dunn, Pierce, St. Croix, Pepin, Crawford, Juneau, Marathon, Richland, Sauk, Taylor and Wood Counties, Wis., and to points within 100 miles of St. Paul in Douglas, Burnett, Washburn, Sawyer and Rusk Counties, Wis., and (2) from Winona, Minn., to points in Wisconsin within 100 miles of Winona. It maintains terminals at St. Paul and other points and operates 29 tractors and 37 trailers. Its balance sheet, as of May 31, 1954, shows total assets of $128,408, including current assets of $62,012, liabilities of $65,472 including current liabilities of $52,911, and capital stock and surplus of $62,936.

Ruan holds certificates authorizing the transportation of petroleum products from and to specified points and areas in Illinois, Iowa, Minnesota, Missouri, Nebraska, and Wisconsin. Included in such authority is the right to transport the described commodities from Minneapolis, St. Paul and New Brighton, Minn., to points in Barron, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Jackson, Eau Claire, LaCrosse, Marathon, Monroe, Pepin, Pierce, Polk, Rush, St. Croix, Taylor, Trempealeau, Washburn, and Wood Counties, Wis. It maintains terminals at a number of points, including New Brighton, approximately 24 miles from Pine Bend, and operates 172 tractors and 233 tank trailers. Its balance sheet, as of August 14, 1954, shows

total assets of $2,073,515, including current assets of $1,531,858, liabilities of $1,023,149, including current liabilities of $653,721, and a net worth of $1,050,366. For the period January 1 to August 14, 1954, inclusive, its operations resulted in a net profit after taxes of $48,530.

Quickie has certificates authorizing the transportation of certain liquid commodities from and to specified points and areas in Iowa, Minnesota, and Wisconsin and holds temporary authority to transport petroleum products from Wrenshall, Minn. to points in Iowa, Minnesota, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula of Michigan. It maintains terminals at Minneapolis and other points and operates 28 tractors and 32 trailers. Its balance sheet, as of February 28, 1954, shows total assets of $131,068, including current assets of $67,637, liabilities of $65,535 including current liabilities of $32,369, and capital stock and surplus of $65,533. For the two months ending February 28, 1954, its operations resulted in net profit of $5,219.

Hvidsten has authority, as material herein, to transport petroleum products (1) from Duluth, Minn., to points in a specified area in North Dakota, (2) from Alexandria and Mankato, Minn., and points in Minnesota within 10 miles of each, points in Hennepin and Ramsey counties, Minn., points in Woodbury, Afton, Cottage Grove and Denmark Townships, Washington County, Minn., and points in Dakota County, Minn., north of the southern boundary of Burnsville, Lebanon, and Rosemont Townships to points in North Dakota, and (3) from the site of the United States Air Force storage installation near Hastings, Minn., to Fargo Municipal Airport at or

near Fargo. It maintains terminals at Alexandria, and other point and operates 19 tractors and 26 trailers. Its balance sheet, as of December 31, 1953, shows total assets of $370,856, including current assets of $58,287, liabilities of $34,671, and capital stock and surplus of $336,185.

Dahlen has a certificate authorizing the transportation of petroleum products from Minneapolis and St. Paul and points within 10 miles of each and Alexandria, Minn., to the port of entry on the boundary of the United States and Canada at or near International Falls, Minn. It also holds authority to transport the described commodities from the Twin Cities area to points in Minnesota. It maintains terminals at St. Paul and other points and operates 37 tractors and 43 tank trailers. Its balance sheet, as of June 30, 1954, shows total assets of $265,252, including current assets of $78,699, liabilities of $118,800, and a net worth of $146,452.

Indianhead holds authority, as material herein, to transport the described commodities from and to specified points and areas in Iowa, Michigan, Minnesota, North Dakota, South Dakota and Wisconsin including authority (1) from Minneapolis and New Brighton, Minn., and points within 10 miles of each to Wahpeton, Fargo, Grand Forks and Jamestown, N. Dak. and points within 10 miles of each, (2) from Minneapolis and St. Paul and points within 5 miles of St. Paul to points in Wisconsin and the Upper Peninsula of Michigan within 275 miles of St. Paul except those in Houghton and Keweenaw Counties, Mich., (3) from Minneapolis and St. Paul and points within 10 miles of each to points in Iowa and South Dakota, (4) from Winona and Scotchlite,

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Minn. and points in the Minneapolis - St. Paul, Minn. Commercial Zone to Ironwood, Mich., Ashland, Chippewa Falls, Hayward, Ladysmith, Mellon, Menomonie, Mercer, New Richmond, Rice Lake, Eau Claire, Park Falls, Spooner, Turtle Lake, Durand, Independence, Mondovi, Osseo, Whitehall, and Arcadia, Wis. and points in the Town of Dodge, Trempealeau County, Wis., (5) from Winona, Minn. to points in Wisconsin within 125 miles of Winona except Chippewa Falls, Ladysmith, Menomonie, New Richmond, Rice Lake, Eau Claire, Spooner, Turtle Lake, Durand, Independence, Mondovi, Osseo, Whitehall, and Arcadia, Wis., and points in the Town of Dodge, Trempealeau County, Wis., and (6) from the site of the United States Air Force storage installation near Hastings, Minn. to Des Moines Municipal Airport at or near Des Moines, Iowa, Rapid City Air Force Base at or near Rapid City, S. Dak., Sioux Falls Municipal Airport at or near Sioux Falls, S. Dak., and Truax Air Force Base at or near Madison, Wis. It maintains terminals at St. Paul and other points, operates 114 tractors and 110 tank trailers, and provides key-stop deliveries to consignees desiring that service. As of June 30, 1954, its balance sheet shows total assets of $829,695, including current assets of $222,682, liabilities of $403,578 including current liabilities of $207,192, and a net worth of $426,117. For the six months ending June 30, 1954, its operations resulted in net profit of $41,179.

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Indianhead is presently transporting the described commodities from Minneapolis and St. Paul and points within 10 miles of each to points in Minnesota on and east of

U. S. Highway 53 between Duluth, Minn., and the United States-Canada boundary line. In performing such operations it uses Minnesota Highway 23 which extends through the northwest corner of Wisconsin between Sandstone and Duluth, Minn., for a distance of approximately one-half mile. Recently Indianhead ascertained that utilization of this route requires authority from the Commission because of the interstate nature of the service involved. It seeks authority to continue its present operation over Minnesota Highway 23 rather than over Minnesota Highway 61 which is 4 miles longer, traverses a more populated area, and requires one-half hour longer in transit between the areas in question. It asserts that it handles approximately 10 to 15 truck loads of traffic monthly from the Twin Cities area to the destination area involved and estimates that based upon out-of-pocket costs of 30 cents per mile, it saves approximately $350 annually in operating expenses by use of the interstate route. It also asserts that operation over the route does not enhance its competitive position in the territory or adversely affect existing carriers to any material extent.

* * * * *

[Sheet 16 through part of Sheet 23 omitted]

In behalf of applicants (Schirmer, Terminal Transport, Ruan, Indianhead, Quickie, Hvidsten, and Dahlen in Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28) MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30) and MC-113410 (Sub-No. 1), respectively.

Great Northern Oil Company, hereinafter called Northern, at the time of the hearing had a refinery under construction at Pine Bend, Minn., an unincorporated point

without a post-office of the same name located approximately 11 miles south of the city limits of St. Paul scheduled for completion about July 1, 1955. The plant is designed to produce approximately 25,000 barrels of liquid commodities daily and will have an initial production of approximately 17,500 barrels or 737,940 gallons daily. This production will be made up of 512,400 gallons of gasoline, 93,240 gallons of number 1 fuel oil, and 132,300 gallons of number 4 fuel oil. Number 2 fuel oil will be produced in turn by blending number 1 and 4 fuel oils. In addition to these commodities the plant will have a daily production of approximately 70,480 gallons of liquefied petroleum gas of which 41,500 gallons will be propane and 28,980 gallons butane gas. About 75 per cent of that plant's output will be taken by Socony-Vacuum Oil Company and approximately 5,000 barrels of the daily production will

be allotted to Western Oil and Fuel Company if negotiations now under way with that company are successful. The remaining daily production will be sold to customers throughout Wisconsin. There is some likelihood that propane and butane gases may be distributed in a wider territory with some shipments going to Minnesota as well as Wisconsin. The refinery has storage facilities for 35 days production and loading racks to accommodate rail tank cars and tank trucks. While the refinery contemplates shipments by both rail and truck it is particularly desirous of obtaining sufficient motor carrier service for the movement of its products. It believes that rail service will be too slow on occasions for its shipments and that many of its customers will not have facilities to accommodate rail shipments or will not be located on a rail line. It estimates that one

day's production would total 134 truckloads if shipped entirely by motor carrier and it believes that it will require the services of all of the applicants except Terminal Transport.

Western Oil and Fuel Company, hereinafter called Western, is engaged in the distribution of petroleum products in Minnesota, Iowa, Illinois, Nebraska, Wisconsin, North Dakota, South Dakota, and the Upper Penin ula of Michigan. It has negotiated with Northern to take 5,000 barrels of the latter's daily production at Pine Bend. The commodities obtained from the plant, other than liquefied petroleum gas, would be distributed in Wisconsin and possibly in North Dakota and South Dakota. They would supplant shipments

now moving to these areas principally from Minneapolis and New Brighton and to some extent from Wrenshall, Minn. If available, it would also distribute propane gas from the plant to points in Wisconsin and North Dakota in lieu of shipments of this commodity which are now made from Texas. It desires all of the applicants' services available from Pine Bend if and when it has traffic moving from that point.

Socony-Vacuum Oil Company, hereinafter called Socony, is engaged in the producation, refining, and marketing of petroleum and petroleum products. Its marketing operations in the described territories are conducted through its White Eagle and Wadhams Divisions. The former has jurisdiction over North Dakota, South Dakota, Minnesota except the Southeast portion, Iowa except the eastern portion, and seven counties in Wisconsin. The latter's jurisdiction extends over the Upper Peninsula of Michigan

and the remaining portions of Minnesota, Iowa, and Wisconsin. Socony is presently shipping the described commodities except liquefied petroleum gas into Wisconsin and the Upper Peninsula of Michigan principally by Indianhead and Terminal Transport from a barge terminal at St. Paul and the Great Lakes Pipeline terminal at Minneapolis. These sources of supply will be largely supplanted by the Pine Bend refinery. Socony is also shipping liquefied petroleum gas from Texas to points in Wisconsin and will obtain these commodities from Pine Bend when they become available at that point.

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It plans to expand its distribution territory for liquefied petroleum gas and will solicit business in Minnesota and other areas where there is a market for this commodity. Socony owns a large fleet of tank cars and will use rail service from Pine Bend when practicable. However, it will require motor carrier service for much of its traffic as rail service is not adequate in many cases where customers are not situated on a rail line or do not have facilities to handle rail shipments. It supports all of the applicants but is particularly interested in the services of Schirmer, Ruan, Terminal Transport and Indianhead.

Northwestern Refinery Company operates refineries at St. Paul Park and New Brighton, Minn. The St. Paul Park refinery has a daily production of 12,000 barrels and is being expanded to produce 30,000 barrels daily within two or three years. The New Brighton refinery has a daily production of 2,500 barrels. Shipments of gasoline, diesel and tractor fuels, road oils and liquefied petroleum gas are made from the refineries to points in North Dakota, South Dakota, Wisconsin, northern Iowa, and the Upper Penin-

sula of Michigan. Shipper has found Dahlen's service satisfactory in Minnesota and would like to have it available for its traffic moving to out-of-State destinations.

[Sheet 26 through part of Sheet 29 omitted.]

Protestants' Evidence

* * * * *

Discussion and Conclusions

As stated, division 5 in a prior report in No. MC-101075 (Sub-No. 17) denied Transport's application in toto. In No. MC-108449 (Sub-No. 29), the examiner recommended that Indianhead be granted authority (1) from Minneapolis and St. Paul

Minn. and points within 10 miles of each except Pine Bend, Minn. to points in North Dakota except Wahpeton, Fargo, Grand Forks, and Jamestown, N. Dak. and points within 10 miles of each, and (2) from Minneapolis and St. Paul and points within 10 miles of each to points in Minnesota on and east of U. S. Highway 53 between Duluth, Minn. and the United States-Canada international boundary line; and that the application be denied in all other respects. In Nos. MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25) and MC-107496 (Sub-No. 42), the joint board recommended that (1) Schirmer be granted authority from the site of the Great Northern Oil Company's refinery at Pine Bend, Minn. to points in Wisconsin within 150 miles of St. Paul, Minn. and to Nekoosa and Wisconsin Rapids, Wis., (2) Terminal Transport be granted authority from the site of the Great Northern Oil Company's refinery at Pine Bend to points in Polk, Barron, Chippewa,

Clark, Jackson, Monroe, Vernon, LaCrosse, Trempealeau, Buffalo, Eau Claire, Dunn, Pierce, St. Croix, Pepin, Crawford, Juneau, Marathon, Richland, Sauk, Taylor and Wood Counties, Wis., and to points in Douglas, Burnett, Washburn, Sawyer and Rusk Counties, Wis. within 100 miles of St. Paul, (3) Ruan be granted authority from the site of the Great Northern Oil Company's refinery at Pine Bend to points in Barron, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Jackson, Eau Claire, LaCrosse, Marathon, Monroe, Pepin, Pierce, Polk, Rusk, St. Croix, Taylor, Trempealeau, Washburn, and Wood Counties, Wis., and that the applications be denied in all other respects. In Nos. MC-108449 (Sub-No. 28), MC-112223 (Sub-No. 19), MC-28132 (Sub-No. 30) and MC-113410 (Sub-No. 1), the examiner recommended that (1) Indianhead be granted authority from the site of the

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Great Northern Oil Company's refinery at Pine Bend to points in Wisconsin and the Upper Peninsula of Michigan within 273 miles of St. Paul except those in Houghton and Keweenaw Counties, Mich., (2) Quickie be granted authority from the site of the Great Northern Oil Company's refinery at Pine Bend to points in Wisconsin and the Upper Peninsula of Michigan, and (3) Dahlen be granted authority from the site of the Richards Oil Company's blending plant at Savage, Minn. to points in North Dakota and Wisconsin; and that the applications be denied in all other respects including the complete denial of Hvidsten's application.

By their petition, exceptions and replies, applicants maintain generally that the evidence adduced in support of the applications justifies favorable findings in their respective

cases and denial of the authority sought in all or certain of the remaining cases. In addition, they allege errors in statements of fact and conclusions set out in the prior and preliminary reports which have been given careful consideration herein and corrected to the extent found justified. Rail carriers contend that the proposed services should be denied as existing rail transportation facilities are adequate and sufficient to handle the traffic moving or to be moved in the described territories. At the outset of our discussion we desire to make it clear that we do not believe that rail service alone is sufficient or adequate to meet the complete needs of supporting shippers for the movement of petroleum products in the described territories. As shown, tank cars are not

available on many occasions when requested and rail service does not provide the flexibility or expedition necessary for the movement of the described commodities in numerous instances. Furthermore, some consignees are not located on a rail line and others do not have facilities to handle rail shipments. Witnesses appearing in support of the applications assert the need for motor carrier services in lieu of or in addition to rail service and the record clearly establishes such need where we hereafter find that the requested authorities should be granted.

Authorities sought by the respective applicants in these proceedings overlap to a large extent in the areas under consideration. Several propose service for identical shippers throughout the same general territory and it must be determined therefore first whether there is a public need for additional service between the points involved, and second, if such need exists, which of the several carriers seeking to

perform the service should be authorized herein. Certain applicants place considerable stress upon the so-called "key-stop" service performed for various bulk jobbers. They assert that shippers using this service require a single carrier to handle all of their transportation requirements because that carrier is particularly familiar with their delivery requirements. The reasons advanced for this are that a bulk jobber must know and have complete faith in a carrier to give it a key to its establishment and that there is danger of mixing and contamination of products when the bulk plant is set up for key-stop deliveries and another carrier delivers a load when not familiar with the plants facilities. We are not convinced that the key-stop service of itself is sufficient evidence of public need to justify

the authorization of additional service in a described territory. While it is apparent that such a service is a convenience to the bulk-jobbers who utilize it, the advantages resulting therefrom do not warrant a finding that the public convenience and necessity require a service upon this basis alone.

Shipper support for the proposed operations relates principally to traffic moving or to be moved from the Twin Cities area of Minnesota including Minneapolis, St. Paul, New Brighton (approximately 5 miles north of St. Paul), Rossville (approximately 5 miles from St. Paul), St. Paul Park (approximately 2 miles south of St. Paul), Savage (approximately 7 miles from St. Paul) and Pine Bend (approximately 11 miles south of St. Paul). Of the described origins, Pine Bend stands out as a point having a strong well established need for the services proposed. The record shows that the refinery at that point was expected to

have an initial production in 1955 of approximately 17,500 barrels of petroleum products daily and a capacity production at a later date of 25,000 barrels daily. This output is to be taken for the most part by oil companies engaged in marketing operations and the balance will be distributed by the refinery itself. As shown, Socony has contracted for approximately 75 per cent of the plant's production for distribution in Wisconsin and the Upper Peninsula of Michigan. This gallonage will supplant that presently procured from sources at Minneapolis and St. Paul. Western is negotiating

to take approximately 5,000 barrels of petroleum products daily from the plant for distribution in Wisconsin, North Dakota and South Dakota and this gallonage would supplant that presently obtained from Minneapolis and New Brighton and to a limited extent from Wrenshall, Fargo, and Grand Forks. Pine Bend production which is not taken by marketing companies will be sold direct by the refinery to consumers in Wisconsin. Northern, Socony and Western assert a need for both rail and motor carrier services to handle their shipping requirements from the completion date of the refinery. They are particularly concerned that sufficient motor carrier service be made available in addition to rail to handle shipments requiring expeditious deliveries and those consigned to customers not located on a rail line or which do not have facilities to handle rail shipments. They agree that several motor carriers will be needed to handle their respective shipping requirements. Northern believes that all of the applicants except Terminal Transport should be authorized, Socony favors Schirmer, Ruan, Terminal Transport and Indianhead

and Western appears to favor Schirmer and Quickie. It is evident that shipments from Pine Bend will move principally to points in Wisconsin and the Upper Peninsula of Michigan and will supplant traffic now moving from principal sources of supply at Minneapolis and St. Paul. Several applicants are presently authorized to serve a portion of the

destination territory involved in Wisconsin and Michigan as well as the origin points from which the traffic is presently moving. Schirmer, Terminal Transport, Ruan, and Indianhead operate from Minneapolis and St. Paul and Quickie under temporary authority from Wrenshall to points in Wisconsin and/or Michigan. Hvidsten is presently authorized to serve the described origins but does not serve destinations in Wisconsin and Michigan. Dahlen operates only from the Twin Cities area to the United States-Canadian border. We feel that special consideration should be accorded those carriers presently serving the origins to be affected by the new source of supply at Pine Bend and which already have permanent authority to serve a portion of the destination areas involved. At present a refinery only is under construction at Pine Bend and the examiner recommended a grant of authority only from the site of such refinery. Since the issuance of his report herein we have been advised informally that other facilities are being or have been constructed there and that any grant herein should include points within at least one mile of Pine Bend. As seen Pine Bend is an unincorporated point apparently without a post office of the same name. In the circumstances a grant from Pine Bend and points within two miles thereof to be sure it is broad enough appears

proper. Considering the evidence, it is concluded that Schirmer, Terminal Transport, Ruan, and Indianhead should be authorized to handle the described traffic from the site of the Pine Bend refinery and points within two miles of Pine Bend to the destination areas hereinafter designated and that such services will be sufficient to handle shippers' motor carrier traffic from the described origin territory.

[Sheet 35 through part of Sheet 39 omitted.]

The authorities herein authorized to the extent they duplicate any heretofore granted to such applicants shall not be construed as conferring more than one operating right. The authorities granted will provide for the transportation of the commodities described in appendix 13 to the report in Descriptions in Motor Carrier Certificates, 61 M. C. C. 209, 294.

Findings

In No. MC-101075 (Sub-No. 17) on reconsideration, we affirm the prior finding that the applicant has failed to establish that the present or future public convenience and necessity required the proposed operation, and that the application should be denied. The prior order in this proceeding denying the application has not been vacated or set aside and is reaffirmed herein.

In No. MC-108449 (Sub-No. 29), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in appendix 13 to the report in Descriptions in Motor Carrier Certificates, supra, from Minneapolis and St. Paul,

Minn., and points within 5 miles of St. Paul to points in Minnesota on and east of U. S. Highway 53 between Duluth, Minn., and the United States-Canada international boundary line.

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In No. MC-103654 (Sub-No. 30), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix 13 to the report in Descriptions in Motor Carrier Certificates, supra, from the site of the Great Northern Oil Company's refinery at or near Pine Bend, Minn., and points within 2 miles of Pine Bend to points in Wisconsin within 150 miles of St. Paul, Minn., and to Nekoosa and Wisconsin Rapids, Wis.

In No. MC-103947 (Sub-No. 25)[3], we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix 13 to the report in Descriptions in Motor Carrier Certificates, supra, from the site of the Great Northern Oil Company's refinery at or near Pine Bend, Minn., and points within 2 miles of Pine Bend to points in Vernon, Crawford, Juneau, Richland, and Sauk Counties, Wis., and to points in Sawyer County, Wis., within 100 miles of St. Paul, Minn. (Also from Pine Bend and points within 2 miles thereof to points in Polk, Bar-

[3] As the operating rights held by Terminal Transport Co., have been acquired by Ruan Transport Corporation the authority granted in this proceeding will be made to the successor in interest.

ron, Chippewa, Clark, Jackson, Monroe, LaCrosse, Trempealeau, Buffalo, Eau Claire, Dunn, Pierce, St. Croix, Pepin, Marathon, Taylor and Wood Counties, Wis., and to points in Douglas, Burnett,

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Washburn and Rusk Counties, Wis., within 100 miles of St. Paul, Minn. No authority will be granted covering these latter points as they are included in the authority granted in No. MC-107496 (Sub-No. 42).

In No. MC-107496 (Sub-No. 42), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix 13 to the report in Descriptions in Motor Carrier Certificates, supra, from the site of the Great Northern Oil Company's refinery at or near Pine Bend, Minn., and points within 2 miles of Pine Bend to points in Barron, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Jackson, Eau Claire, LaCrosse, Marathon, Monroe, Pepin, Pierce, Polk, Rusk, St. Croix, Taylor, Trempealeau, Washburn, and Wood Counties, Wis.

In No. MC-108449 (Sub-No. 28), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix 13 to the report in Descriptions in Motor Carrier Certificates, supra, from the site of the Great Northern Oil Company's refinery at or near Pine Bend, Minn., and points within 2 miles of Pine Bend to points in Wisconsin and the Upper Peninsula of Michigan within 275

miles of St. Paul, Minn., except those in Houghton and Keweenaw Counties, Mich.

In No. MC-28132 (Sub-No. 30), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common

carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix 13 to the report in Descriptions in Motor Carrier Certificates, supra, from the site of the Richards Oil Company's plant at or near Savage, Minn., to points in Wisconsin and those in North Dakota except Wahpteon, Fargo, Grand Forks and Jamestown, N. Dak., and points within 10 miles of each.

In No. MC-113410 (Sub-No. 1), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, as described in Appendix 13 to the report in Descriptions in Motor Carrier Certificates, supra, from the site of the Richards Oil Company's plant at or near Savage, Minn., to points in Wisconsin and those in North Dakota except Wahpeton, Fargo, Grand Forks and Jamestown, N. Dak., and points within 10 miles of each.

In each of the foregoing, we further find that the respective applicants are fit, willing and able to perform the described services and to conform to the requirements of the act and to our rules and regulations thereunder; that appropriate certificates should be granted; and that the applications in all other respects should be denied.

In Nos. MC-101075 (Sub-No. 17) and MC-112223 (Sub-No. 19), we find that applicants have failed to establish that the present or future public convenience and necessity require the proposed operations, and that the applications should be denied.

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Upon compliance by applicants in Nos. MC-108449 (Sub-No. 29), MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No. 1) with the requirements of Sections 215 and 217 of the act, and with our rules and regulations thereunder, appropriate certificates will be issued. An order will be entered denying these applications except to the extent that they are granted herein and denying the applications in Nos. MC-101075 (Sub-No. 17) and MC-112223 (Sub-No. 19).

Tuggle, *Commissioner*, dissenting-in-part:

I would grant authority to Quickie to transport petroleum products, in bulk, in tank vehicles, from the site of the Great Northern Oil Company's refinery at or near Pine Bend, Minn., and points within 2 miles of Pine Bend, to points in Wisconsin and the Upper Peninsula of Michigan.

I am authorized to state that Commissioner Mitchell concurs in this expression.

Commissioners Minor and McPherson did not participate in the disposition of these proceedings.

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of July, A. D. 1956.

No. MC-101075 (Sub-No. 17)
Transport, Inc. Extension—Minnesota—North Dakota

No. MC-108449 (Sub-No. 29)
Indianhead Truck Line, Inc. Extension—North Dakota

No. MC-103654 (Sub-No. 30)
Schirmer Transportation Company, Inc. Extension
Pine Bend, Minn.

No. MC-103947 (Sub-No. 25)
Terminal Transport Co. Extension—Pine Bend, Minn.

No. MC-107496 (Sub-No. 42)
Ruan Transport Corporation Extension—Pine Bend, Minn.

No. MC-108449 (Sub-No. 28)
Indianhead Truck Line, Inc. Extension—Pine Bend, Minn.

No. MC-112223 (Sub-No. 19)
Quickie Transport Company Extension—Pine Bend, Minn.

No. MC-28132 (Sub-No. 30)
Hvidsten Transport, Inc. Extension
Dakota County, Minn.

No. MC-113410 (Sub-No. 1)
Dahlen Transport, Inc. Extension—North Dakota

It appearing, That on March 15, 1955, the Commission, division 5, entered its report, ——— M. C. C. ———, and order in No. MC-101075 (Sub-No. 17) denying the application;

It further appearing, That upon consideration of the record, of petition filed by applicant, and of replies of interveners in opposition, the proceeding in No. MC-101075 (Sub-No. 17) was reopened for reconsideration on the present record, by order of August 18, 1955;

And it further appearing, That reconsideration of the matters and things involved in the proceeding in No. MC-101075 (Sub-No. 17) has been given and an investigation of the matters and things involved in the remaining proceedings embraced herein having been made, and that the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the report of March 15, 1955, are hereby referred to and made a part hereof;

It is ordered, That said order of March 15, 1955, be, and it is hereby, reaffirmed.

It is further ordered, That, in Nos. MC-108449 (Sub-No. 29), MC-103654 (Sub-No. 30), MC-103947 (Sub-No. 25), MC-107496 (Sub-No. 42), MC-108449 (Sub-No. 28), MC-28132 (Sub-No. 30), and MC-113410 (Sub-No

1), the applications therein, except to the extent granted in said report, be, and they are hereby, denied.

And it is further ordered, That, in No. MC-112223 (Sub-No. 19), the application therein be, and it is hereby denied.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

Before the
Interstate Commerce Commission

No. MC-101075 (Sub-No. 19)[1]
Transport, Inc., Extension

Petition for Quickie Transport Company in Docket MC-112223 (Sub-No. 19) for Reconsideration of the Report of the Commission.

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Due Date: September 4, 1956.

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[1] Consolidated as the title case with Nos. MC-108449 (Sub-No. 29) Indianhead Truck Line, Inc., Extension—North Dakota; MC-103654 (Sub-No. 30) Schirmer Transportation Company, Inc., Extension—Pine Bend, Minn.; MC-103947 (Sub-No. 25) Terminal Transport Co., Extension—Pine Bend, Minn.; (On 2-6-56, in No. MC-F-6081, Division 4 approved the acquisition of Terminal Transport Co. by Ruan Transport Corporation), MC-107496 (Sub-No. 42) Ruan Transport Corporation Extension—Pine Bend, Minn.; MC-108449 (Sub-No. 28) Indianhead Truck Line, Inc., Extension—Pine Bend, Minn.; MC-112223 (Sub-No. 19) Quickie Transport Company Extension—Pine Bend, Minn.; MC-28132 (Sub-No. 30) Hvidsten Transport, Inc., Extension—Dakota County, Minn.; and MC-113410 (Sub-No. 1) Dahlen Transport, Inc., Extension—North Dakota.

Before the
Interstate Commerce Commission

No. MC-101075 (Sub-No. 19)
Transport, Inc., Extension

Petition of Quickie Transport Company in Docket MC-112223 (Sub-No. 19) for Reconsideration of the Report of the Commission.[2]

For Further Hearing

Quickie Transport Company petitions for a reconsideration of the Commission Report in Docket MC-112223 (Sub-No. 19), decided July 2, 1956, and upon reconsideration for authorization of service described in its application in this docket from the site of Great Northern Oil Company refinery at or near Pine Bend, Minn., and points within two miles of Pine Bend, to points in Wisconsin and the Upper Peninsula of Michigan.

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[2] This report is the initial decision in this proceeding which was heard on the consolidated record described on the title page. For the purpose of this petition the application of petitioner is deemed to include only authority limited according to the examiner's recommendation. Also, for the purpose of this petition, it is assumed the other carriers concerned are the motor carriers who are granted authority from Pine Bend to areas in Wisconsin and the Upper Peninsula, namely, Schirmer Transportation Company, Inc., Ruan Transport Corporation, Terminal Transport Co., and Indianhead Truck Line, Inc. These are referred to herein, as elsewhere in the record, as Schirmer, Ruan, Terminal and Indianhead. The petitioner is called Quickie. Reference to the "report" is, of course, to the Commission Report, reconsideration of which is asked.

Specification of Error and Relief Sought

Petitioner respectfully submits that the Commission erred in denying petitioner's application for a certificate to the extent that it denied authority to petitioner from the site of the refinery at Pine Bend and within two miles thereof to points in Wisconsin and the Upper Peninsula of Michigan. It asks the report be reconsidered and upon reconsideration such authority be granted.

More precisely it assigns as error this conclusion (Sheet 35):

> "Considering the evidence, it is concluded that Schirmer, Terminal Transport, Ruan, and Indianhead should be authorized to handle the described traffic from the site of the Pine Bend refinery and points within two miles of Pine Bend to the destination areas hereinafter designated and that such services will be sufficient to handle shippers motor carrier traffic from the described origin territory."

and this conclusion (Sheet 35):

> "We feel that special consideration should be accorded to those carriers presently serving the origins to be affected by the new source of supply at Pine Bend and which already have permanent authority to serve a portion of the destination areas involved."

The grounds of this assignment are:

1. The distinction between Schirmer, Terminal, Ruan and Indianhead on the one hand and Quickie on the other in the grants of authority from Pine Bend to Wisconsin and the Upper Peninsula is wholly without evidentiary support and hence contrary to law.

2. If the consolidated record of these proceedings shows public convenience and necessity calls for a grant of authority to any other applicant from Pine Bend, as a matter of law it also requires a grant of authority to Quickie.

3. On this record public convenience and necessity is shown to require the services of petitioner to the extent recommended by the examiner.

Petitioner predicates these contentions on the report, reconsideration of which is asked, and the record. They are discussed in the pages following. At the outset it points out a conviction that the recitals of the report do not legally justify denial of its application, and that reasonably interpreted the record even more strongly supports Quickie than other applicants. Furthermore, it believes the mere lack of permanent interstate authority to a part of the destination area described, which is the only ground stated for denying Quickie's application in toto, is not a legally sufficient ground for distinguishing between carriers for it is not a proper element of the proof of public convenience and necessity for a carrier's service.

The following discussion is divided. First, there is a consideration of the facts shown by the record and recited in the report, in demonstration of the assertions of the preceding paragraph. It is noted there is no material discrepancy of fact (as distinguished from conclusion) as far as petitioner is concerned between the commission's report and the examiner's report and recommended order, and none between either of those documents and the record. Second, there is a brief statement of legal considerations which petitioner believes properly pertain to the conclusion of the report that there should be a denial of authority to Quickie.

Consideration of the Facts

This discussion is confined to the parts of the report and the record which bear on authority from Pine Bend to Wisconsin and the Upper Peninsula of Michigan. Quickie does not object to the grant of authority to Indianhead, Schirmer, Terminal and Ruan; it maintains the evidence which justifies those grants of necessity calls for a grant of authority to it.

At the hearing before the examiner the other carriers arrayed themselves against Quickie. They defined their opposition as two-fold. One ground was that the point of origin, which in Quickie's application was written to include points within ten miles of the refinery, would encroach on the Twin City commercial zone which they were authorized to serve. This ground was eliminated by an amendment (Record p. 208). The other ground was stated as "the proposed service insofar as the origin point of Pine Bend is a new service", and "no new authority is needed from that point" (Record pp. 14, 15, 17). This was based on the proposition they hoped to establish, i.e., that Pine Bend as a point of origin should be included in the Minneapolis-St. Paul commercial zone. That ground for opposition, however, disappeared when it became clear the new refinery would not be within the Minneapolis-St. Paul commercial zone as defined by commission order. Thus both aspects of their protest were met early and positively.

After the hearing Indianhead alone urged exceptions to the recommendation of the examiner in respect to Quickie's application, though Schirmer in its Reply to All Exceptions "adopted" without much discussion Indianhead's position. Petitioner believes the exceptions expressed by Indianhead in its arguments were entirely without merit and that this was demonstrated in Quickie's reply to

them. The import of the exceptions was mainly that Indianhead did not want to have Quickie's competition. As none of the arguments in support of the exceptions seems to have been regarded by the commission it would be a needless extension of this petition to answer them again by repeating what has been said.

Need for common carrier service by motor vehicle from Pine Bend was shown by the three shippers who together market the refinery's entire production, namely, Great Northern Oil Company, owner of the refinery, Socony-Vacuum Oil Company and Western Oil and Fuel Company, who are respectively hereinafter called Great Northern, Socony and Western. The substance of their testimony is found in 68 pages of the voluminous record (pp. 269-337) where the facts are succinctly and plainly stated and none is controverted.

The report makes three essential findings, all of which are in agreement with the findings of the examiner. They are:

1. All applicants are fit and able financially and otherwise to conduct the proposed operations (Sheet 9).

2. There is a strong, well established need for the services proposed for the Pine Bend origin (Sheet 33). There was no question that the production of the refinery will be as the report summarizes it and its shipping facilities are as described.

3. Shipments from Pine Bend will move principally to points in Wisconsin and the Upper Peninsula of Michigan (Sheet 34).

The most careful reading of the report and the record discloses no fact relevant to public convenience and nec-

essity which is less favorable to Quickie than to the other carriers. The evidence is clear and unequivocal, there is no dispute on any material point, and there is not need and no room for interpretation. The commission apparently found nothing detracting from Quickie's testimonial equality with the other carriers for nothing of the kind is recited and the report is markedly devoid of any factual justification for denial of its application.

Shipper preference is at least as favorable to Quickie as to the others. The report shows that Great Northern supports all of them. Socony favors the other carriers. Western favors, decidedly, Quickie and Schirmer (Sheet 34).

There is no finding that traffic from Pine Bend will not support five carriers as well as four, in their respective destination areas. The evidence would not sustain such a finding. There is no finding that a grant of authority to Quickie would adversely and materially affect any of the other carriers and there is no evidence from which that could be found. Furthermore, it is a reasonable assumption that such evidence is not in fact available, for the competent counsel who presented the cases were quite aware of the significance such evidence would have if it were in the record. It is fair to conclude from the testimony of its representative that Socony will continue to use Terminal and Indianhead, from Pine Bend as it has in the past from the Twin Cities origin, and that neither would lose tonnage to Quickie if it were authorized as long as they also have authority from Pine Bend. Socony has not used Indianhead to the Upper Peninsula from the Twin Cities, so any shifting of supply for that area from this origin could not prejudice that carrier (Record p. 121), and, as Terminal seemingly has no authority to the Upper Peninsula it could not be hurt by that kind of a shift either. Ruan does not trans-

port for Socony from the Twin Cities origin so it has nothing to lose by a shifting of that shippers supply (Record p. 82). If Socony should follow a tentative plan to originate shipments to Wisconsin and the Upper Peninsula in the Twin Cities, granting authority to Quickie for Pine Bend would be immaterial (Record p. 335).

Schirmer hauls only occasionally for Socony so it does not have much of that business to lose (Record p. 98). Schirmer should continue to get its share of Western's business from Pine Bend if Quickie is authorized there for it and Quickie are the two carriers preferred by that shipper (Sheet 34). Great Northern favors all of the carriers but much of its business will be new business (Record p. 272, et seq.).

There was hardly need for it but all of the carriers were alerted to the requirements of the so called follow-the-traffic doctrine by Mr. Boroughs, the examiner (Record p. 106), but, as found by him, there was no reliance on it (Examiner's Report, Sheet 14). There was no real effort by any carrier to show a right to the traffic at Pine Bend, which is admittedly a new source, because of shifting supply. There was only the briefest and most general reference in the testimony of each carrier to that, and any attempt to measure the dependence of any of them on traffic which is likely to be supplanted would be conjectural at best (As to Schirmer see Record p. 87, Ruan p. 72, Terminal p. 107, Indianhead p. 121). Obviously the implied assumption the record shows these carriers would be mutually affected by a change of supply to Pine Bend simply will not bear scrutiny.

It is true witnesses believe the new source of supply at Pine Bend will supplant in some measure existing sources in the Twin Cities area and Wrenshall, but while this may

be a reason for granting authority to the other carriers, it certainly is not properly a reason for denying it to Quickie.

The record is as explicit in the needs of shippers as it is lacking of a showing that any of the other carriers needs to be protected against a grant of authority to Quickie. Socony says it wants four carriers from Pine Bend (though only two of them are being used by it now from the Twin Cities origin). Great Northern needs Quickie as well as those four, and Western, while supporting all applications, particularly needs Quickie which is one of its principal carriers. All the other carriers had the opportunity of disproving, or at least of questioning, that showing of need. None did. The need for Quickie's service is established with unimpeached testimony and undisputed evidence. Only Indianhead formally opposed the examiners' finding and recommendation but even that carrier did not attempt at the hearing to show by evidence or cross examination a reason for not granting authority to Quickie. It is unthinkable a single carrier without grounds or effort should be able to stand in the way of a grant of authority which the proof clearly demands.

In contrast to the vagueness of Mr. Buerosse, speaking for Wadhams Division of Socony, about how much of Pine Bend's production allotted to it will have its shipping origin there and about where it will be shipped (Record p. 321) Western and Great Northern are positive.

The foregoing synopsis demonstrates that without material inconsistency the consolidated record, which is a composite of the evidence of all parties, shows:

1. There is no evidence from which it can be found the traffic out of Wrenshall will not support five as well as

four carriers, especially as the destination areas do not coincide.

2. There is no showing sufficient to establish a recognizable pre-emptive right in any carrier to traffic from the Pine Bend source.

3. There is (a) no evidence of a measurable dependence by any carrier on the traffic which might be supplanted by the new source, and (b) no evidence upon which any carrier can predicate a justifiable demand or need for protection from Quickie's competition at Pine Bend and (c) no evidence that any carrier would lose patronage of any shipper upon which it now depends.

4. A need at Pine Bend for the proposed service of the five carriers, and no attempt on the part of any carrier to disprove the need or disparage the shipper testimony describing it (except Indianhead's exception to the examiner's report).

5. A need for motor carrier to Wisconsin points and the Upper Peninsula, an area which is embraced only in Quickie's application.

6. A shipper preference as strong for Quickie as any other carrier.

7. No showing that Quickie was in any respect lacking in diligence in making or presenting its application.

8. Equal fitness and ability of the five involved carriers.

9. Equality in the record on the proof of public convenience and necessity.

10. Absence of any fact detracting from Quickie's equal right to a certificate under the law.

Legal Considerations

Despite the overwhelming showing in Quickie's favor the Commission's report denies its application completely. This is done on the conclusion that the four named carriers "will be sufficient to handle shippers traffic from the described origin territory," and by an arbitrary disqualification of a carrier which does not "have permanent authority *to a portion* of the destination areas involved" (Sheet 35, emphasis supplied).

The broad discretionary authority of the Commission is recognized. It is necessary and proper characteristic of its function. However, it is well settled and fundamental that constitutional due process requires that its

> "* * * ultimate finding must be based on the proper statutory criteria and must have had the necessary factual findings to support it."
>
> Interstate Commerce Commission v. Parker, 326 U. S. 60, 65 S. Ct. 1490.

(See 42 Am. Jur., Pub. Adm. Law, Sec. 150 for numerous cases affirming this statement of the law and where it is said, "If after holding a hearing, a commission acts without regard to the evidence, or makes a ruling wholly unsupported by the evidence, it cannot be said to have exercised its discretion.") The common law is the injunction of the Administrative Procedure Act.

The decision in question violates this rule in both of its aspects; there is neither the necessary factual finding to support it, nor is the ultimate finding based on statutory criteria. Hence reconsideration is asked.

We emphasize that the record as shown by the transcript and exhibits, which must "constitute the exclusive record for decision" (Sec. 7, 60 Stat. 241, 5 U. S. C., Sec. 1006),

was carefully made in earnestly contested proceedings, between adversaries represented by competent counsel before an able and impartial examiner. Quickie carried its burden of proof (as perhaps did the others) and there was no attempt by motor carrier opponents to impeach Quickie's case, no adverse cross examination, no rebuttal—nothing but formal expression of protest at the outset of the hearing. Under the circumstances Quickie had the right to—indeed must—rely on the record it made, and had no right to introduce rebuttal evidence in anticipation of a nonexistent defense. If there are facts upon which denial of its application could be justified to the extent of the authority now sought they are facts which do not appear in the record and about which there is no "factual finding". Such would not support an order. L. & P. Bluff Ry. Co. v. U. S., 257 U. S. 114, 42 S. Ct. 25, 66 L. Ed. 156; B. & O. R. Co. v. U. S. (Chicago Junction Case), 264 U. S. 258, 44 S. Ct. 317.

The record lends no support to the conclusion that four carriers can handle the shipments from the described origin. Maybe that could have been established but it was not. The unquestioned proof is to the contrary and to find so scorns the evidence presented and relied upon in good faith by all, and places a different value on the same evidence as it applies to Quickie than as it applies to others.

At this point it is noted that the proof shows and the report finds, as did the examiner, a need for service "to points in Wisconsin and the Upper Peninsula." Only Quickie's application encompasses all that territory, and a result of excluding Quickie is the need for a recognized service is not met. This is because of differing destination authority. Without Quickie part of the Wisconsin area and the Upper Peninsula cannot be served from Pine Bend; the re-

maining part of the Peninsula and all (or practically all) of Wisconsin between 150 miles and 275 miles from St. Paul will be served by only one carrier—Indianhead. To cut out so much of the territory where need is shown to exist to motor carrier access from Pine Bend and restrict much of the rest to a single carrier bears no resemblance to what was proof of the public convenience and necessity of the case.

Proof of public convenience and necessity measured by the standard used for other carriers requires grant of authority to Quickie. No fact which bears on need appears in the record for excluding this one carrier. The reason assigned, apparently is that Quickie does not have permanent authority *to a portion* of the destination territory. But holding permanent authority to either all or a portion of destination area is not required under the statute and is not thereunder a characteristic of a "qualified applicant" under Section 207 (a). Here there are none of the factors such as inadequacy of traffic, lack of diligence in making application, or lack of shipper preference, upon which the Commission felt justified in relying to exclude an applicant in such cases as Wesson Company, ext., MC-54591 (Sub-No. 5), 6 F. C. C. 259, Sober, Inc., Ext. MC-8989 (Sub-No. 126), 7 F. C. C. 681), and Shortway Lines, Inc., MC-13027 (Sub-No. 4), 27 M. C. C. 510, 2 F. C. C. 151. There is here only the sheer fact that such permanent authority is not held and on this record the import of the decision inevitably is that that fact per se is disqualifying. Such limitation on a carrier's right to a certificate is beyond the Commission's delegated authority to declare.

Petitioner's position, respectfully stated and argued, is that the Commission has exceeded its authority, first in its finding which is without evidentiary foundation, and second, in its excluding from favorable consideration Quickie

for a reason not outside the meaning and authority of governing statute, and that on the record it is entitled to the certificate it now seeks. It does not assume or imply, of course, the Commission intended to disregard the requirements of law or to permit a decision in disregard of the record for that could only encourage distrust of administrative process. Rather it believes a petition for reconsideration is designed to call such a situation to commission attention for correction where it inadvertently occurs. That is petitioner's entire purpose and meaning here.

Respectfully submitted,

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JAMES E. WILSON,
Continental Building,
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Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing petition upon all parties in these proceedings by mailing first class a copy thereof to each party, properly addressed.

Dated at Little Falls, Minnesota, this 31st day of August, 1956.

Gordon Rosenmeier.

APPENDIX D

United States District Court
District of Minnesota
Fourth Division

Quickie Transport Company, a corporation,
Plaintiff,

vs.

United States of America, and Interstate Commerce Commission,
Defendants,

and

Indianhead Truck Line, Inc., and Schirmer Transportation Company,
Intervening Defendants.

No. 4-57-Civ-65

Decision

Gordon Rosenmeier, Little Falls, Minnesota, attorney for plaintiff, James E. Wilson, Washington, D. C., of counsel.

Fallon Kelly, United States Attorney, St. Paul, Minnesota, Kenneth G. Owens, Assistant United States Attorney, St. Paul, Minnesota, Victor R. Hansen, Assistant Attorney General, Washington, D. C., James E. Kilday and Willard R. Memler, attorneys, Department of Justice, Washington, D. C., attorneys for defendant United States of America.

Robert W. Ginnane, General Counsel, Washington D. C., and Francis A. Silver, Associate General Counsel, Wash-

ington, D. C., attorneys for defendant Interstate Commerce Commission.

Glenn W. Stephens, Madison, Wisconsin, attorney for intervening defendant Indianhead Truck Line, Inc. Stephens, Bieberstein, Cooper & Bruemmer, Madison, Wisconsin, of counsel.

Donald A. Morken, Minneapolis, Minnesota, attorney for intervening defendant Schirmer Transportation Company. Mackall, Crounse, Moore & Helmey, Minneapolis, Minnesota, of counsel.

Before Sanborn, Circuit Judge, and Donovan and Devitt, District Judges. Devitt, District Judge.

This is an action to vacate and set aside an order of the Interstate Commerce Commission, dated July 2, 1956, which denied plaintiff's application for irregular route operating rights as a common carrier of petroleum from a recently constructed oil refinery near Pine Bend, Dakota County, Minnesota to certain points in Wisconsin and the Upper Peninsula of Michigan.

The Commission's denial of plaintiff's application was made in a consolidated proceeding which included related applications by other oil carriers. The two intervening defendants here, Indianhead Truck Line, Inc. and Schirmer Transportation Company, are competing petroleum carriers to the plaintiff and were successful applicants, along with Ruan Transport Company and Terminal Transport Company, for the grant of similar authority. Plaintiff's petition for reconsideration of the denial of its application, filed September 4, 1956, was denied by order of the Commission on December 18, 1956.

The gist of the Commission's order of July 2, 1956 is

that Quickie had failed to establish that present or future public convenience and necessity required its proposed operation.

The plaintiff assigns as error this conclusion contained in the Commission's report:

> "Considering the evidence, it is concluded that Schirmer, Terminal Transport, Ruan, and Indianhead should be authorized to handle the described traffic from the site of the Pine Bend refinery and points within two miles of Pine Bend to the destination areas hereinafter designated and that such services will be sufficient to handle shippers' motor carrier traffic from the described origin territory."

And also this conclusion:

> "We feel that special consideration should be accorded to those carriers presently serving the origins to be affected by the new source of supply at Pine Bend and which already have permanent authority to serve a portion of the destination areas involved."

The essence of Quickie's complaint is that the record shows that all 5 of these interested carriers (Schirmer, Terminal, Ruan, Indianhead and Quickie) were shown by the record to be equally fit and able to render the services petitioned for, and that there is no basis for the distinction which resulted in the granting of the applications of the 4 other carriers and denying its application. It points out that the record reflects that the testimony by all of the shippers was at least as favorable to Quickie as to the others. By way of example, one of the shippers, Great Northern Oil Company, supported all 5 applications. Another shipper, Western Oil and Fuel Company, decidedly favored

2 of them—Schirmer and Quickie. Quickie urges that the Commission made no finding that traffic from Pine Bend would not support 5 carriers as well as 4. Quickie admits, however, that there was no specific evidence offered by itself or by any of the carriers to show that the traffic would support 5 or any specific number of carriers.

Plaintiff's application for a certificate of authority was filed, and the Commission acted, under 49 U. S. C. A. 207 (a) which provides as follows:

> "Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; *provided, however,* that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

It appears from this statute that it is the primary responsibility of the Commission to determine compliance with the requirements set out in the law. An applicant has the burden of showing that the proposed service "* * * is or will be required by the present or future public convenience and necessity; * * *".

As is well established, the authority of courts in reviewing the actions of an administrative body are very limited. We are confined to determining whether there is warrant in the law and the facts for the Commission's action. We can go no further. We cannot substitute our judgment for that of the Commission or challenge the wisdom of its action. United States v. Pierce Auto Freight Lines, 327 U. S. 515; 66 S. Ct. 687; 90 L. Ed. 821; Federal Security Administrator v. Quaker Oats Co., 318 U. S. 218, 227, 228; 63 S. Ct. 589; 87 L. Ed. 724. For further recent expression of our limited authority in this respect, see Canadian Pacific Railway Company v. U. S., 158 F. Supp. 248; Minneapolis & St. Louis Railway Co. v. U. S., 165 F. Supp. 893.

It appears that the Pine Bend industrial area, some 10 miles south of the St. Paul-Minneapolis commercial zone, became a new major shipping point with the recent construction there of the Great Northern Refinery. Previously the 4 successful carriers, Schirmer, Terminal, Indianhead and Ruan, had been certificated as petroleum products carriers to serve the Twin Cities area, but because Pine Bend was geographically not within the established Twin Cities zone, these carriers could not operate from Pine Bend under that authority, and it was necessary for each of the 4 existing licensed carriers, as well as others who desired to be licensed, to file an application for authority to serve the Pine Bend area.

The record shows that the 4 successful carriers have been certificated since 1942 as carriers of bulk petroleum products from the Twin Cities zone to destinations in Wisconsin. Quickie has not been so certificated. It is apparent from reading the Commission's order that it based its decision to grant the applications of the 4 presently certificated

carriers, and to deny the application of Quickie (and others who have not appealed the denial), on the grounds that a special consideration should be accorded to carriers presently serving the area generally, since the new business originating at Pine Bend was only supplanting part of that formerly originating within the Twin Cities commercial zone. In this connection the Commission said:

> "It is evident that shipments from Pine Bend will move principally to points in Wisconsin and the Upper Peninsula of Michigan and will supplant traffic now moving from principal sources of supply at Minneapolis and St. Paul."

It seems reasonable to us for the Commission to conclude, in the light of these unchallenged facts, that the 4 regularly licensed carriers now serving the Twin Cities area should have their authority extended to cover the Pine Bend area. In effect, this is merely a geographical enlargement of the Twin Cities shipping zone to serve approximately the same amount of traffic.

But Quickie urges that the evidence does not show that the traffic out of Pine Bend will not support 4 as well as 5 carriers. As a presumed expert in the field, the Commission concluded that since Pine Bend was partially supplanting the Twin Cities area as an origin point, and since the Twin Cities area was adequately served by 4 carriers, there was no need for an additional licensed carrier. By its own admission, Quickie offered no evidence to support a finding that the traffic required the certification of 5, 6, or any additional number of carriers. This was its burden.

Quickie also urges that it was the only applicant that proposed to serve all of Wisconsin and the Upper Peninsula of Michigan and that the 4 successful applicants do not serve certain sections of the area which it proposes to

serve. But the simple answer to this contention is that there was no showing of any need for a petroleum carrier to serve all of the area, including the remote and sparsely settled sections.

We have fully considered all of the other arguments and contentions of the plaintiff and view them as being without merit. We conclude that the Commission's order is based on adequate findings supported by substantial evidence in the record before it, and that the Commission properly exercised its authority under the law and that the action of the Commission was not unreasonable, arbitrary or capricious.

The plaintiff's complaint is dismissed.

Dated January 30, 1959.

John B. Sanborn,
United States Circuit Judge.
Dennis F. Donovan,
United States District Judge.
Edward J. Devitt,
United States District Judge.

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

No. 338

QUICKIE TRANSPORT COMPANY

Appellant

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees

AND

INDIANHEAD TRUCK LINE, INC., AND SCHIRMER TRANSPORTATION COMPANY

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, FOURTH DIVISION

MOTION TO AFFIRM

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In the
Supreme Court of the United States

No. ——

QUICKIE TRANSPORT COMPANY

Appellant

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees

AND

INDIANHEAD TRUCK LINE, INC., AND SCHIRMER TRANSPORTATION COMPANY

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, FOURTH DIVISION

MOTION TO AFFIRM

Appellee, Schirmer Transportation Co., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the Order and Decree of the District Court, from which this appeal is taken, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the Order and Decree entered January 30, 1959, by a District Court of three

judges, District of Minnesota, especially constituted pursuant to *28 U. S. C.*, Sections 2284 and 2235. This order dismissed a complaint by the appellant here against the United States of America and the Interstate Commerce Commission, in which the appellant, Quickie Transport Company, hereafter "Quickie", charged that the Interstate Commerce Commission had erred in denying, on July 2, 1956, appellant Quickie's application, pursuant to Section 307 (a), *49 U. S. C.*, for a certificate of public convenience and necessity for irregular route operating rights as a common carrier of petroleum products from a recently constructed oil refinery near Pine Bend, Dakota County, Minnesota to certain points in Wisconsin and the Upper Peninsula of Michigan. Quickie petitioned the Commission for reconsideration of its Order of July 2, 1956. The petition was denied December 18, 1956. This appeal followed.

The Quickie application was heard in a consolidated proceeding in which the Commission also heard the applications of four other petroleum carriers for common carrier authority similar to the authority sought by Quickie. These four carriers were Indianhead Truck Line Inc., Schirmer Transportation Co., Ruan Transport Company, and Terminal Transport Co., herein called Indianhead, Schirmer, Ruan, and Terminal. Indianhead and Schirmer are intervening appellees in these proceedings.

The four carriers just named were successful before the Commission and were granted certificates in the order of July 2, 1956, allowing operations from Pine Bend to portions of Wisconsin and the Upper Peninsula of Michigan. The application of Quickie was denied.

Appendix B of appellant's Jurisdictional Statement is the Report of the Commission under consideration. On pages 52 to 55 of appellant's statement, the Commission's

summary of the action taken on each application is found. The Court will note that there were ten separate matters consolidated for decision. Only five of those matters are material here. Those are:

MC 103654 (Sub 30) [Schirmer]
MC 103947 (Sub 25) [Terminal]
MC 107496 (Sub 42) [Ruan]
MC 108449 (Sub 28) [Indianhead]
MC 112223 (Sub 19) [Quickie]

In all five of these cases the origin point of Pine Bend, Minnesota, was applied for. The destination areas in these five cases are not precisely identical, but all of them include portions of Wisconsin and, in the Indianhead and Quickie cases, some parts of the Upper Peninsula of Michigan. It will serve no purpose to describe in detail the destination areas in each. Suffice it to say that each case had Pine Bend in common and also, roughly speaking, areas of Wisconsin and the upper Michigan peninsula.

The gist of Quickie's complaint was, and is, that the Commission had no reasonable basis for granting certificates to Schirmer, Indianhead, Ruan, and Terminal, and, at the same time, denying Quickie's application.

Appellee Schirmer does not accept the accuracy of appellant's claim as to the questions presented on this appeal (see pages 2-4 of Appellant's Statement). In truth, the only question presented is this:

Where many motor carriers have applied for the same or similar authority from and to the same, or roughly the same points and areas, and where there is a clearly demonstrated public convenience and necessity for the motor carrier service (without regard to how many motor carriers are needed), what criteria can the Commission adopt in

determining that some of the applicants should be granted authority and that one (or more) applicants should not be granted authority?

When the question is put in the above accurate form, and when the actual criteria employed by the Commission are considered, the Court will recognize the manifest unsubstantial nature of the problem.

ARGUMENT

This Court has held that the Interstate Commerce Commission is empowered to do what it did in this case.

The Interstate Commerce Commission has been given by Congress no more precise guide in determining applications for certificates under Section 307 (a). *49 U. S. C.* (Section 207 (a), Motor Carrier Act of 1935) than that of "Public Convenience and Necessity", supplemented by the broad statements contained in *49 U. S. C.* preceding Section 1, the "National Transportation Policy". The Commission possesses a wide range of discretionary authority in determining whether the public interest warrants certification of any particular proposed service. *Schaffer Transportation Co. v. United States*, 355 U S. 83, 2 L. Ed. 2d 117, 78 S. Ct. 173.

Perhaps the most basic question to be answered here is whether the Commission has the power at all to deny one applicant and grant other applicants when all seek the same authority. The answer must obviously be in the affirmative. If one applicant is found to be not fit or able to conduct the proposed operation, Section 307 (a), *49 U. S. C.*, gives the Commission no choice but to deny that applicant. But, even where the fitness or ability of all applicants is established, as in this case, the Commission

still has the power and the duty to limit the number of carriers performing the same service to as many as are necessary to satisfy the public's "convenience and necessity".

Merely because there has been proven a need for motor carrier service from point A to area B does not mean that every carrier which applies for authority to operate from point A to area B must be granted the authority. Such a principle would abrogate Section 307 (a), *49 U. S. C.*, which states that the Commission shall issue a certificate if it is found "* * * that the proposed service, * * *, is or will be required by the present or future public convenience and necessity; otherwise the application shall be denied".

The Commission has both the power and the duty to grant an application under Section 307 (a) when the public convenience and necessity has been proven for that applicant's service, and to deny an applicant when the public convenience and necessity has not been proven for that applicant's service. The fact that multiple applications are filed and heard at the same time for the same or similar authority does not alter the Commission's power and duty in this regard.

This Court has clearly anticipated the power of the Commission in cases involving multiple applicants for the same authority in *U. S. v. Pierce Auto Freight Lines*, 327 U. S. 515, 90 L. Ed. 821. The two applications in that case and the hearings thereon were "* * * substantially co-ordinated, though not technically consolidated, for the common features of the applications." 327 U. S. at 520.

At 327 U. S. at 526 the Court states:

> "The possibilities therefore were that both applications might be denied, that one might be granted and the other denied, or that both might be granted."

On page 524 of 327 U. S., the Court stated:

> "* * *; and from the beginning it was as much a possible outcome that both applications would be granted as that both would be denied or one be granted and one denied."

The evidence in both hearings in the *Pierce* case was substantially the same (327 U. S. at 520), as is the case here with certain exceptions, unimportant to the decision here.

The appellant, Quickie, impliedly concedes that the Commission is not bound to treat multiple applicants in identical fashion. Appellant's objections are directed more to the criteria which the Commission used in deciding between the appellant, Quickie, and the other four applicants.

The Commission, and the District Court, found, that, upon the facts, Quickie's case differed from that of the four successful carriers.

It is a fact, established by evidence in the record, that the situation with regard to Quickie is not the same as with Schirmer, Indianhead, Ruan, and Terminal.

The District Court pointed out (pp. 105-106 of appellant's statement Appendix D):

> "The record shows that the four successful carriers have been certificated since 1942 as carriers of bulk petroleum products from the Twin Cities zone to destinations in Wisconsin. Quickie has not been so certificated."

The Court went on to state that the Commission's grounds for denying Quickie and granting the other four applications was based on the fact that:

> "* * * the new business originating at Pine Bend was only supplanting part of that formerly originating within the Twin Cities commercial zone."

This is significant when it is realized that the Pine Bend industrial area is only some 10 miles south of the St. Paul-Minneapolis commercial zone. (District Court opinion, Appendix D, p. 105 of appellant's statement).

The District Court then stated:

> "As a presumed expert in the field, the Commission concluded that since Pine Bend was partially supplanting the Twin Cities area as an origin point, and since the Twin Cities area was adequately served by 4 carriers, there was no need for an additional licensed carrier."

Appellants' arguments.

Appellant's two primary arguments are:

(1) that the Commission acted arbitrarily in according the 4 successful applicants preference because the Pine Bend origin would supplant traffic formerly enjoyed by these 4 applicants from the Twin Cities, and

(2) that there is no evidence that the amount of traffic from Pine Bend will not support 5 carriers (including Quickie) as well as 4.

As to the first argument, the District Court has completely and correctly concluded that the 4 successful applicants were in a different pose than Quickie and that it was reasonable for the Commission to preserve to these 4 carriers the business they had formerly enjoyed. Appellant, Quickie, incidentally, in its "Questions Presented by Appeal" does not question the sufficiency of the evidence to support any of the findings of the Commission. The Dis-

trict Court itself found the Commission's findings to be based on substantial evidence. Quickie questions only the power and discretion of the Commission to distinguish between the applicants on such grounds.

As to Quickie's second argument, the District Court pointed out correctly that Quickie had a burden of showing that the need for service from Pine Bend encompassed a need for 5 carriers, *including Quickie*. Quickie has conceded at all times that it did not produce any evidence which tended to show that the amount of traffic required the certification of *any number* of carriers *in addition to* the four successful applicants (Appendix D, p. 106 of appellant's statement).

Appellant claims that no other applicant introduced evidence of that type, and that by a "retroactive", "ex post facto" ruling the Commission and the District Court decided that Quickie had the burden of showing a need for 5 carriers while the other 4 applicants were spared this burden. Appellant claims in effect that it had no notice that it had a different burden of proof than the other 4. It is noted in Appendix C, which is Quickie's petition for reconsideration to the Commission, appellant did not request a rehearing or the opportunity to produce further evidence. Nor did Quickie even suggest to the Commission in its petition, or at any time, that it was able to produce evidence that 5 carriers were required to originate traffic out of Pine Bend to the involved destination areas. Quickie's contention, boiled down, is that there is no evidence on the point, and that therefore the issue must be decided in Quickie's favor.

Each of the 5 applicants had an independent duty to prove their cases. The Commission found sufficient proof for the 4 successful applicants and those orders are not

now contested, nor can they be. If Quickie intended, in filing its application, to "ride in" on the basis of the same evidence as the other four applicants, then Quickie could be reasonably expected to make sure there were no important distinctions between its situation and the situations of the other 4 carriers, all of which may have given the Commission grounds for treating Quickie's application differently.

The Commission itself has a long announced policy that where a new origin point is being opened and from which traffic will flow which formerly came from another point, the carrier enjoying the former traffic will be granted authority where there is no existing service or there is inadequate service from the new origin point. See *Smith & Solomon Trucking Co., Extension-Camden, N. J.*, 61 M. C. C. 748, and cases cited.

This is the "follow the traffic" principle, which the Commission has held applicable in many situations. Quickie knew that it lacked certification from the Twin Cities and also knew that the other 4 applicants, Indianhead, Schirmer, Ruan, and Terminal, had such authority. Since Quickie relies on the same witness' testimony, it should have been aware, in its preparation for the case, that the Pine Bend traffic would supplant, to some extent, Twin Cities traffic. Realizing this, Quickie should have been aware that the case was ripe for application of the "follow the traffic" principle, and that this principle could not operate in Quickie's favor but might have operated in favor of the other 4 applicants.

Careful analysis of its position beforehand should have warned Quickie that it had a special problem of its own that could be solved only by introduction of evidence that the need for service from Pine Bend was so great

as to require 5 carriers. The other four carriers did not have this special problem since they could rely on the "follow the traffic" theory. The Commission's order, respecting the 4 successful applicants, is unassailed and the correctness of the "follow the traffic" principle is not before this Court.

The appellant seems to argue that the parties did not assert the "follow the traffic" theory and that therefore this principle could not reasonably be used by the Commission in distinguishing between the applicants. The answer to this is that regardless of the contentions of the parties, the Commission has the power to decide a case on a principle not expressly asserted by the parties. The courts have this same power and frequently exercise it.

The District Court expressly concluded that the Commission had a reasonable basis for distinguishing between the applicants and that appellant Quickie had a burden of proof that it failed to meet.

Quickie cannot now be heard to complain that it was not given notice that its application might be treated differently than the others. This possibility was within the permissible outcomes and was injected by the filing of the application itself. *U. S. v. Pierce Auto Freight Lines*, 327 U. S. 515, 90 L. Ed. 821, 66 S. Ct. 687.

Once the Commission had justifiably applied the "follow the traffic" theory to the 4 successful applicants, it found itself devoid of record evidence, any reasonable basis, or theory, on which it could grant Quickie the authority sought. Quickie itself failed to provide such evidence or basis.

CONCLUSION

It is submitted that this appeal presents questions which involve only an applicant's duty to produce sufficient evidence to warrant certification by the Commission, the propriety of certain well established criteria employed by the Commission to solve the frequent problem of multiple applicants for the same or similar authority. There is a factual basis in the record for the criteria used, and this is not denied by the appellant. The District Court completely and correctly answered the contentions of the appellant here. The questions presented are of too minor a nature to warrant repetition of these arguments before this Court.

It is submitted that the decision and Order of the District Court should be affirmed without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Perry R. Moore, one of the attorneys for the appellee, Schirmer Transportation Company, and a member of the Bar of the Supreme Court of the United States, served upon all of the parties of record hereto by first class mail, properly addressed, and with postage prepaid.

PERRY R. MOORE.

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In The

Supreme Court Of The United States

No. 338

QUICKIE TRANSPORT COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

INDIANHEAD TRUCK LINE, INC., and SCHIRMER TRANSPORTATION COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, FOURTH DIVISION

MOTION TO AFFIRM JUDGMENT

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MOTION TO AFFIRM JUDGMENT

OBJECT OF MOTION

Appellee, Indianhead Truck Line, Inc., moves the Court to affirm the judgment of the three-judge United States District Court dismissing the complaint.

The ground for this motion is that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. (Rule 16-1(c))

FACTUAL BASIS OF MOTION

Appellant, Quickie Transport Company, brought an action before the District Court to vacate an order of the Interstate Commerce Commission which denied Quickie's application for operating rights as a common carrier by motor vehicle of petroleum from an oil refinery near Pine Bend, Minnesota, to certain points in Wisconsin and the Upper Peninsula of Michigan.

Quickie's application was heard by the Commission in a consolidated proceeding which included applications for substantially the same authority by Indianhead Truck Line, Inc., Schirmer Transportation Company, Ruan Transport Company and Terminal Transport Company, all motor common carriers of petroleum.

The Commission found that Pine Bend is a[t] at 11 miles south of St. Paul-Minnesota. (Page 69[1]) A large refinery was being built at Pine Bend at the time of the hearing. (Page 68) The Commission found, "It is evident that shipments from Pine Bend will move principally to points in Wisconsin and the Upper Peninsula of Michigan and will supplant traffic now moving from principal sources of supply at Minneapolis and St. Paul." (Page 71)

Indianhead, Schirmer, Ruan and Terminal Transport have been certificated by the Commission since 1942 to transport bulk petroleum from the Twin Cities commercial zone to points in Wisconsin. Quickie, however, was not so certificated. (Pages 62-67)

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[1] The Commission's order is printed in Appendix B to Quickie's Statement as to Jurisdiction. Our page references are to Appendix B.

The Commission found that the services of Indianhead, Schirmer, Ruan and Terminal Transport would be sufficient to handle shippers' motor carrier traffic from Pine Bend to the destination area. (Page 78) As the District Court noted in its opinion, "By its own admission, Quickie offered no evidence to support a finding that the traffic required the certification of 5, 6 or any additional number of carriers." (Quickie's Appendix D, page 106)

The Commission also said, "We feel that special consideration should be accorded to those carriers presently serving the original to be affected by the new source of supply at Pine Bend and which already have permanent authority to serve a portion of the destination areas involved." (Page 77)

The Commission granted the applications of Indianhead, Schirmer, Ruan, and Terminal Transport. It denied Quickie's application, finding that Quickie failed to establish that present or future public convenience and necessity requires its proposed operations. (Page 82)

The District Court dismissed Quickie's complaint which sought to vacate the order of the Commission.

ARGUMENT

The applicable statute is 49 U. S. C. A. 207(a) which provides,

> "Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Quickie makes no claim that Indianhead and the other applicants failed to sustain the burden of proof required under the statute. Rather, Quickie claims that it, too, sustained the burden of proving that its proposed operation is or will be required by public convenience and necessity.

As the District Court noted, "It is apparent from reading the Commission's order that it based its decision to grant the applications of the 4 presently certificate carriers, and to deny the application of Quickie (and others who have not appealed the denial), on the grounds that a special consideration should be accorded to carriers presently serving the area generally, since the new business originating

at Pine Bend was only supplanting part of that formerly originating within the Twin Cities commercial zone." "In effect, this is merely a geographical enlargement of the Twin Cities shipping zone to serve approximately the same amount of traffic." (Quickie's Appendix D, pages 105, 106)

The record did not justify certification of more than four carriers. Quickie conceded this before the District Court. (Quickie's Appendix D ,page 106) Faced with this admission, Quickie turns it into the following: "As stated above, there was no finding, and no evidence from which a finding could be made, that four carriers and not five would be required to haul the traffic." (Statement as to Jurisdiction, page 15) Quickie concludes from its characterization of the record that if the four carriers are certificated, then the fifth—Quickie—must also be certificated.

Quickie's conclusion would mean that if twenty-five carriers apply for the same authority and the record justifies certification of any one of the twenty-five, then all must be certificated, even if no evidence is presented that the entire number are required to haul the traffic.

Since there were multiple applicants, it was the Commission's duty carefully to evaluate their requests to serve in terms of the entire public need. This it has done, in a forty-three page decision summarizing the evidence relating to each application. The Commission acted as an expert in balancing the various interests of the individual carriers and the public. The courts cannot invade the province of the Commission in reaching its expert judgment on the "intricasies of the transportation problems which are involved. That function is reserved exclusively for the Commission." *U. S. v. Carolina Freight Carriers, Corp.*, 315

U. S. 475, 490, 62 S. C. 722, 730, 86 L. Ed. 971, 983. The court "will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling." *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547, 32 S. Ct. 108, 111, 56 L. Ed. 308, 311.

The function of a court reviewing a Commission order was stated in *U. S. v. Pierce Auto Freight Lines*, 327 U. S. 515, 536, 66 S. Ct. 687, 698, 90 L. Ed. 821, 835:

> "It is limited to ascertaining whether there is warrant in the law and facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

Quickie, on this appeal, would have this Court substitute its own judgment for that of the Commission in an intricate transportation problem involving multiple applicants. The three-judge District Court carefully reviewed and rejected Quickie's contention, saying,

> "We conclude that the Commission's order is based on adequate findings supported by substantial evidence in the record before it, and that the Commission properly exercised its authority under the law and that the action of the Commission was not unreasonable, arbitrary or capricious." (Quickie's Appendix D, page 107)

CONCLUSION

We respectfully submit that the judgment of the three-judge District Court should be affirmed without further argument.

Dated this 16 day of September, 1959.

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No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1969

OTTER TAIL POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1959

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QUICKIE TRANSPORT COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission which denied appellant's application for a certificate of public convenience and necessity to extend its interstate operations. See 28 U.S.C. 2284, 2325.

Appellant was one of seven applicants for irregular route operating rights as a common carrier of petroleum products from Pine Bend, Minnesota, to destinations in Wisconsin and the Upper Peninsula of Michigan. At the time of the hearing before the Commission (July-October 1954), a new oil refinery was being constructed at Pine Bend, an unincorporated town approximately 11 miles south of the city limits of St. Paul, Minnesota (J.S. 68-69). Because Pine Bend was not geographically within the Minneapolis-St. Paul commercial zone, the four motor carriers holding certificates from the Commission authorizing transportation of petroleum products from points within that zone to destinations in Wisconsin and or Michigan[1] were not authorized to operate from Pine Bend (J.S. 77). In April 1954, each of those four carriers filed an application for authority to transport petroleum products from the site of the Pine Bend refinery to its existing certificated destinations in Wisconsin and or Michigan. In May 1954, appellant, which did not have existing authority to operate from the Minneapolis-St. Paul commercial zone,[2] also applied for authority to serve as a petroleum products carrier from Pine Bend to points in Wisconsin and the Upper Peninsula of Michigan. Subsequently, two other motor carriers applied fo similar authority. The seven ap-

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[1] Indianhead Truck Line, Inc.; Schirmer Transportation Company, Inc.; Terminal Transport Company; and Ruan Transport Corporation. Indianhead and Schirmer intervened in the district court and are appellees here.

[2] Appellant had a temporary certificate, later made permanent, to serve the Wisconsin and Michigan areas from Wrenshall, Minnesota, a small town close to Duluth and about 140 miles northeast of Minneapolis-St. Paul.

plications were heard and disposed of on a consolidated record.

The refinery at Pine Bend was not scheduled to be in production until about July 1, 1955—approximately 9 months after the hearing before the Commission (J.S. 68-69). Both rail and tank truck movements from the refinery were contemplated (J.S. 69), and, in addition, Socony-Vacuum Oil Company, which had contracted for about 75 per cent of the refinery product, planned to build a pipe line from the refinery to its St. Paul barge terminal (J.S. 12; Tr. 335). However, no estimates were offered as to the volume of refined products that would move out of the Pine Bend refinery via the various media of transportation. On the other hand, the evidence showed that the two companies which expected to acquire the great bulk of the products of the Pine Bend refinery were currently engaged in distributing like products from Minneapolis-St. Paul origins to destinations in Wisconsin and the Upper Peninsula of Michigan, and that, upon the completion of the Pine Bend Refinery, they expected to serve those destinations very largely out of Pine Bend (Tr. 301, 308, 318-321, 329-30). The products not sold to the other companies for distribution the refinery expected to market itself, primarily to points in Wisconsin (Tr. 289).

The Commission found that motor carrier service from Pine Bend was needed (J.S. 74); that shipments from Pine Bend would move principally to points in Wisconsin and the Upper Peninsula of Michigan and would supplant traffic currently moving from sources of supply at Minneapolis and St. Paul (J.S. 77); and that the four applicants which were presently serving the origins to be affected by the new source of supply

and which already had permanent authority to serve a portion of the destination areas involved should be accorded special consideration (J.S. 77). The Commission concluded that "[c]onsidering the evidence" those four carriers should be authorized to handle petroleum products from Pine Bend to the destination areas already served by them in Wisconsin and or Michigan; that such services would be sufficient to handle the shippers' motor carrier traffic from Pine Bend (J.S. 78); and that appellant had failed to establish that the present or future public convenience required its proposed operation (J.S. 82). The applications of the four Twin Cities carriers were accordingly granted, and those of appellant and the other two applicants were denied (J.S. 83-85). The full Commission denied appellant's petition for reconsideration (J.S. 86-99), and the three-judge district court unanimously sustained the Commission (J.S. 101-107; 169 F. Supp. 826).

ARGUMENT

Appellant's contention that the distinction found to exist between it and the four successful applicants lacks evidentiary and legal support is essentially a factual question which was properly resolved against the appellant by the court below. The probable volume of motor carrier traffic that would move out of the Pine Bend refinery to destinations in Wisconsin and the Upper Peninsula of Michigan was not indicated with any degree of specificity in the record. However, inasmuch as those destinations were currently being supplied by shippers in the Twin Cities area who expected, upon completion of the refinery, to ship largely out of Pine Bend, it was evident that shipments from Pine Bend would supplant traffic currently moving from the

Twin Cities area via the four Twin Cities carriers. The record also showed that the addition of the Pine Bend refinery's production would not increase the consumption of the petroleum products in Wisconsin and the Upper Peninsula of Michigan (Tr. 277, 544). Under those circumstances, the "special consideration" accorded the existing Twin Cities carriers was clearly reasonable. In effect, as the district court held, it was "merely a geographical enlargement of the Twin Cities shipping zone to serve approximately the same amount of traffic" (J.S. 106).

Applicant argues that the proof of need for service from Pine Bend was the same for all parties and there was no basis in the record for determining that the service proposed by it was not equally required in the public convenience and necessity as that of the four carriers certified. That argument adds nothing to the contention that the special consideration accorded the other four carriers was unjustified, for, as an applicant to provide additional service to that already provided from the Twin Cities area, appellant had the burden of showing either that the building of the Pine Bend plant would significantly increase the total amount of traffic or that it could provide a service not offered by one of the existing carriers. See J.S. 106; Interstate Commerce Act, Section 207(a), 49 U.S.C. 307(a); Administrative Procedure Act, Section 7(c), 5 U.S.C. 1006(c). As the lower court found, appellant admittedly "offered no evidence to support a finding that the traffic required the certification of 5, 6, or any additional number of carriers" (J.S. 106), and, while appellant also proposed to serve some areas in Wisconsin and the Upper Peninsula of Michigan which the successful applicants do not serve, it made "no showing of any

need for a petroleum carrier to serve" those additional "remote and sparsely settled sections" (J.S. 107).

CONCLUSION

The decision below is clearly correct and presents no substantial question warranting further review. The judgment of the district court should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1959.

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Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

Schirmer, Indianhead and the Government have moved to affirm the judgment from which plaintiff appeals. All three say about the same thing; thus this brief will consider all three motions together.

While appellees assert the questions presented are "so unsubstantial as not to need further argument," their con-

tentions prove the contrary. Indeed, they highlight the importance and difficulty of the issues involved, and it is no answer to say, as appellees in effect do, that simply because the problems are not easily solved, the Court should leave them to the presumed expertise of the I.C.C.

What the record shows.

Indianhead and Schirmer make two misstatements of critical importance with respect to the record. Somewhat confusing is the further fact that each avoids the other's mistake. Schirmer says the case involves simply an application of the "follow the traffic" doctrine, which Quickie should have known about at the time of the hearing and upon which the four successful applicants had a right to rely (Schirmer's Brief, pp. 9, 10). But the "follow the traffic" rule is precisely what this case is not about.[1] It was expressly ruled out when the hearing first began when none of the applicants, although asked by the examiner, claimed any such right. (See Sheet 14 of the Examiner's Report, Appendix A of the Statement of Jurisdiction, page 42). Nor does the Commission apply the "follow the traffic" doctrine; instead they "feel" that "special consideration should be accorded those carriers presently serving the origins to be affected by the new source of supply at Pine Bend and

[1] The "follow the traffic" rationale (it is nothing more than that) is set out in *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748 where the Commission refused to apply the principle to a carrier which wanted to continue hauling for a shipper that it had served for 13 years and which was opening a new plant. The Commission concluded that a showing of loss of traffic by the applicant was not enough without proof or lack of adequate *existing* service in the new location. "Public transportation is not something which can belong to the applicant." In the pending case, as pointed out, none of the applicants claimed any right to follow the traffic because there was no existing service from the new origin and none could show any real loss of traffic.

which already have permanent authority to serve a portion of the destination areas involved" (Appendix B, p. 77). This "special consideration" is accorded only to those carriers having permanent authority into the destination areas and without any proof as to the extent the new source of supply will affect other origin points, or; indeed, affect the several carriers which are applying.

By implication Schirmer seems to concede none of the parties contended at the hearing the "follow the traffic" rule governed; but Schirmer says the Commission had the power to apply it anyway and not tell anybody about it. This contention is not fair to the record in the case, nor the Commission, and certainly not to Quickie.

On the other hand, Indianhead rightly makes no claim of the applicability of "follow the traffic," but does make this statement (at p. 5 of its brief): "The record did not justify certification of more than four carriers. Quickie conceded this before the District Court (Quickie's Appendix D, page 106)." This is not so. Nor does Indianhead's citation to Appendix D support the assertion. The citation is to a statement by the District Court, not any statement by Quickie. What the Court, not Quickie, said was:

> "As a presumed expert in the field, the Commission concluded that since Pine Bend was partially supplanting the Twin Cities area as an origin point, and since the Twin Cities area was adequately served by 4 carriers, there was no need for an additional licensed carrier. *By its own admission Quickie offered no evidence to support a finding that the traffic required the certification of 5, 6; or any additional number of carriers.* This was its burden." (Italics supplied.)

Plainly, for the District Court to say Quickie admitted it did not offer any evidence to support a finding that more

than four carriers were needed is a far cry from saying Quickie conceded the evidence justified only four carriers. But more to the point, Quickie made no such admission. Quickie's position was then, and is now, that it did give evidence of need for five carriers and the evidence did support such need (see e.g., Appendix C, pp. 94, 95). What Quickie admits is that it offered no more evidence on the question of need than was offered by the other applicants and relied upon by all of them.

The "special consideration" given the four successful applicants has no evidentiary basis and is unreasonable.

The exclusion of Quickie is not based on any evidence. The Government, Indianhead and Schirmer all rely on the Commission's conclusion that "* * * the new business originating at Pine Bend was only supplanting part of that formerly originating within the Twin Cities commercial zone." Like the District Court, appellees accept without murmur this conclusion for the reason that it must be so because the Commission is a "presumed expert in the field." No one disputes—nor can they—that the only evidence in the record for such conclusion is the meager testimony summarized by appellant in its Statement of Jurisdiction. There is absolutely no evidence in the record to show how much the new Pine Bend business will supplant the Twin Cities business nor that any shifting of the supply would have any material effect upon any carrier's revenue or its ability to provide the public with adequate service.

The Government concedes "The probable volume of motor carrier traffic that would move out of the Pine Bend refinery to destinations in Wisconsin and the Upper Peninsula of Michigan was not indicated with any degree of specificity in the record" (Government's Brief, p. 4). In

fact, "* * * no estimates were offered as to the volume of refined products that would move out of Pine Bend refinery via the various media of transportation" (Government's Brief, p. 3). This is not the kind of evidence—indeed, it is not evidence at all—to support a conclusion that there would be any substantial transfer of volume from the Twin Cities to the new refinery. The witnesses could not say how much of Pine Bend's products would go anywhere. There was even testimony that a pipeline might haul much of Pine Bend's products to St. Paul from where it would be shipped out, so that no new authority would be needed (Transcript, p. 222).

But there is more. Here the record showed the shippers' demand for Quickie's services was equally as strong as for the others (Statement of Jurisdiction, pp. 10, 11). How can appellees say, for example, that Western Oil and Fuel Company's support of Quickie's application is to be discounted as a fact while its support of Schirmer in the same breath is to be valued?

The Commission has not decided this case on the evidence but on the basis of an arbitrary measurement of that evidence. It has decided the case not on the proof but on an ex post facto standard of proof. The Government suggests the "special consideration" accorded the Twin Cities carriers with permanent authority into the affected destination area was reasonable because the Pine Bend refinery was "merely a geographical enlargement of the Twin Cities shipping zone * * *" But this was not the basis of the Commission's action; it was the District Court, not the Commission which referred to a "geographical enlargement." The Commission considered Pine Bend to be a new point of origin separate from the Twin Cities. Indeed, Indianhead and Schirmer had argued that no new authority

was needed from Pine Bend, that Pine Bend was simply an extension of their existing authority, and this argument was rejected (see Appendix C, p. 90; Transcript, pp. 14, 15, 17).

Thus the "special consideration" afforded carriers with permanent authority into the destination area stands without any rational support in the evidence. It is pure caprice. If there is anything logical about the discrimination then Quickie should have been allowed to qualify for "special consideration" when shortly thereafter its temporary authority into the area from Wrenshall was made permanent.[2] At least the examiner, who recommended Quickie be given authority, recognized this would be consistent (Appendix A, p. 42).

The conclusion is inescapable: The Commission granted authority to four of the applicants, not because Pine Bend was a geographical enlargement of the Twin Cities, not because they had any right to follow the traffic, not because their business would suffer without it, not because Pine Bend would supplant the Twin Cities business to any definable extent, not because the public need or demand for their service was any greater than for Quickie; and not because they were any more fit or able; but authority was granted solely on the notion that the four carriers with permanent certificates into the area should be favored. The

[2] The application for permanent authority was pending before the Commission at the time of the Pine Bend hearing. In its brief the government refers to Wrenshall as a "small town" about 140 miles northeast of the Twin Cities. If the reference means the traffic out of Wrenshall is insignificant, it is inaccurate because Wrenshall is the site of a large new refinery comparable in size to Pine Bend. Nor is the distance of 140 miles significant since the examiner pointed out that shipments from Pine Bend will supplant traffic now moving from Wrenshall as well as the Twin Cities—although, again, the extent of the shift is indeterminable. (Appendix A, p. 42)

public policy is not served by such an arbitrary discrimination.

The appeal presents substantial issues of federal transportation law.

It appears appellees base their motions to affirm by characterizing the case as simply one where the evidence supports the Commission's findings and that either the questions presented are of "too minor a nature" (Schirmer) to merit appeal or are so "intricate" (Indianhead) that the Court should not intrude on the agency's expertise.

Neither position has merit. The case is not particularly intricate but quite common. Therein lies its importance; the situation of multiple applicants for authority from new origin points is becoming increasingly more common. Basic questions relating to the administration of the federal transportation law are involved. The case obviously troubled the Commission. Two Commissioners dissented from the Commission's decision which reversed the examiner's recommendation that Quickie be granted authority.

Both Indianhead and Schirmer admit they received "special consideration." Neither justifies the preferential treatment. Schirmer attempts to do so on the grounds the Commission somehow applied the "follow the traffic" principle, but as pointed out above, it did not. Indianhead says only the case presents "an intricate transportation problem involving multiple applicants" and the Court should not disturb the Commission's judgment—which begs the question. The question still remains: When the evidence fails to distinguish between multiple applicants and fails further to show how many applicants are needed, can the Commission, after the hearing is completed, after the par-

ties have rested and after the recommended order, grant authority to those carriers which come within an arbitrarily defined class and deny it to those who do not?

The question is novel. Appellees cite little authority and none in point. In *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 66 S. Ct. 687, cited by Schirmer, two applicants, on much the same record, were both granted authority. This is the reverse of the situation here. Suit was commenced in the *Pierce* case by protestants who were successful in the district court, that court reversing the Commission on the grounds, among others, that the parties had never understood both applications might be granted, only one or none. The Supreme Court rejected this contention because any one of the three outcomes was possible, given sufficient evidence to support it. In the pending appeal the issue goes to the preferential, arbitrary classification of the several applicants applied by the Commission after the hearing when the evidence was then in balance as to all.

Schirmer says "Each of the 5 applicants had an independent duty to prove their cases" (Brief, p. 8). True enough, but why should Quickie's burden of proof be different from the others? Why should Quickie be required, as the District Court suggests, to prove public convenience and necessity required five carriers when Schirmer and Indianhead were required to prove only a need for their own services?

Indianhead expresses the rhetorical fear that Quickie's conclusion means that if 25 carriers apply for authority and the record justifies certification of any one of the 25, then all must be certified, even if no evidence is presented that all are required to haul the traffic. But this is the opposite of the instant case. Indianhead uses the example of the record justifying "any one" of the multiple applicants;

but here the record justifies all five applicants and the Commission discounts the evidence by imposing an artificial classification upon it.

Indianhead's example, suspended in a vacuum, is meaningless until placed in context. In such a case the Commission, of course, could take more testimony, or it could establish before the hearing certain standards of proof, or it could act in a number of other ways—none of which was done in the pending case. This appeal presents the issue concretely, apparently for the first time to the Court. Here the evidence among five carriers is in equilibrium as to fitness, ability and shipper preference; further all five applicants rely on the same proof as to public convenience and necessity, and the evidence supports an equal need for all five carriers. As among the five applicants, the need for their respective services is, for all practical purposes, indistinguishable. If, for example, the Commission had adopted the examiner's report and certified all five carriers, including Quickie, there would have been no claim—certainly no basis for any—that the evidence did not support a need for five carriers.

The Commission's "conclusory findings" will not withstand judicial examination.

This Court has held that a claim of administrative "know-how" does not give the record immunity from the Court's scrutiny. In a recent appeal from an Interstate Commerce Commission decision the Court stated:

> "Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the

agency's evaluations had been made in accordance with the mandate of Congress."

Schaffer Transportation Company v. United States, 355 U. S. 83, 88, 78 S. Ct. 173, 177.

And the Court, after studying the record, went on to say in that case:

"There is no finding that the authorization of the proposed service would impair the sound operation of the carriers already certified. Nor has the Commission properly evaluated the advantages urged by the supporting witnesses to determine whether the standard of public convenience and necessity has been met."

355 U. S. at 92, 78 S. Ct. at 179.

Again more recently in *Atlantic Refining Co. v. Public Service Commission of New York*, 79 S. Ct. 1246 (decided June 22, 1959), the Court, presented with the question of whether the evidence sufficiently supported permanent certification by the F. P. C. of the proposed sale of natural gas, examined the record meticulously, rejecting any claimed presumption of expertness as a substitute for the facts. The Court found no support for the "conclusory finding" that "the public served through the Tennessee gas system is greatly in need of increased supplies of natural gas."

SUMMARY

Quickie's exclusion from Pine Bend is not based on evidence. Rather the Commission has fabricated a standard of exclusion to differentiate artificially among multiple carriers when the evidence is in balance.

The issues are substantial, federal questions. With the rapid pace of our economy, more and more refineries are being opened. The standard by which carriers will be grant-

ed authority from these new points of origin is critical. The ultimate end of the Commission's decision here, if its notion of "special consideration" is given the force of rule of law, will be a monopoly of new points of origin for those who already have permanent authority into the destination area. Permitted to remain undisturbed, the decision crystallizes a public policy which excludes where there is no sound reason for excluding, and in so doing does harm, not only to this appellant but to the public interest.

The motions to dismiss should be denied, and it is respectfully submitted that the Court should note probable jurisdiction.

Respectfully submitted,

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